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## The Bill Of Rights, the Common Law, and the Freedom-Friendly State

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# The Bill of Rights, the Common Law, and the Freedom-Friendly State

FRANK I. MICHELMAN\*

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## I. INTRODUCTION

### A. *Constitutional Review of Common Law in the United States*

Remember L.B. Sullivan? Sullivan, a resident of Alabama, sued the New York Times Company for libel in an Alabama state trial court, obtained a jury verdict there for half a million dollars damages, and defended that verdict successfully on appeal before the state supreme court.<sup>1</sup> The *Times* had published an advertisement that appeared to accuse all of the City Commissioners of Montgomery, Alabama, of whom Sullivan was one, of sundry unlawful and brutal deployments of the local police against Dr. Martin Luther King and others at the height of the civil rights confrontations in the American South. Sullivan's case against the *Times* was tried under the common law of Alabama. The Alabama courts overruled objections by the *Times* to certain jury instructions that, the *Times* claimed, unduly widened its exposure to

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\* Robert Walmsley University Professor, Harvard University. This paper was prepared for a conference celebrating the work of Owen Fiss, University of Miami, March 21-22, 2003. I am indebted to Stephen Ellmann, Richard Fallon, Tracy-Lynn Field, Justice Kate O'Regan, Mark Tushnet, André Van der Walt, and Johan Van der Walt for valuable comments and suggestions. Errors are mine alone.

1. See *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

liability.<sup>2</sup>

Sullivan's name lives in history because, in *New York Times Co. v. Sullivan*, the Supreme Court of United States stripped him of his state-court victory.<sup>3</sup> Although Sullivan's case against the *Times* was one that exuded sectional animosities bound up with the civil rights struggle, the Warren Court had no fault to find with the honesty, accuracy, or fairness of the state judiciary's applications of the relevant state-law precedents in Sullivan's favor.<sup>4</sup> Justices Brennan and company acted, rather, on a more categorical ground: that the Alabama common-law defamation rules were in crucial respects at odds with a clause in the national Constitution's Bill of Rights.<sup>5</sup>

How could that possibly have been true? It had long been a fixed point in American constitutional law that violations of the national Constitution's Bill of Rights (the Thirteenth Amendment excepted) can be committed only by states and those exercising the powers of states.<sup>6</sup> L.B. Sullivan, although holding public office at the time, sued strictly as a private citizen, for an injury to his personal reputation.<sup>7</sup> Nevertheless, the U.S. Supreme Court had an easy time finding state action in his case:

We may dispose at the outset of [one ground] asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. . . .

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2. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 262-64 (1964) (describing lower courts' rulings).

3. See *id.* at 292 (reversing the judgment and remanding).

4. See *id.* at 264 n.4 (by-passing and rejecting claims of state judicial bias and overreaching); cf. *Evans v. Abney*, 396 U.S. 435 (1970) (upholding the Georgia courts' enforcement of a racist will, but only after concluding that there was no ground to doubt that the state courts had applied the relevant Georgia standards for will construction objectively and reasonably); *id.* at 439-43 ("We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will."); *id.* at 445 ("In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will.").

5. See *Sullivan*, 376 U.S. at 264. To be precise, the clause the Court applied was the Fourteenth Amendment's guarantee against deprivations of liberty by states. By long-established doctrine, this clause makes the First Amendment's restrictions applicable to state government. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Sullivan*, 376 U.S. at 276-77.

6. See Civil Rights Cases, 109 U.S. 3 (1883); authorities cited *infra* notes 74, 75.

7. Sullivan's status as a public official turned out to be a pivotal consideration in the U.S. Supreme Court's constitutional appraisal of Alabama libel law as applied to his proceeding against the *Times*. *Sullivan*, 376 U.S. at 268 ("The question before us is whether [the state liability rule], as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the first and fourteenth amendments."); *id.* at 279-80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . ."). Recognition of Sullivan's public-official status did not, however, lead to any suggestion that the latter's act of subjecting the *Times* to the risk of defamation liability (that is, by filing the lawsuit) was itself an act attributable to the state.

[T]he proposition . . . that [the] Fourteenth Amendment is directed against State action and not private action . . . has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>8</sup>

In other words: Who made the law that encroached unduly on free speech? Why, Alabama did. What more state action could you want? Is the lawmaking any less the act of Alabama because it is done by the state's common-law judiciary instead of by the state's legislature?

The reasoning seems ironclad, especially in our post-positivist, post-*Erie* age.<sup>9</sup> It cannot, however, be accepted to the hilt without ditching the "state action" doctrine. Think of any civil action between private parties, in which one claims the other has treated him in a manner made unlawful by the Constitution, "the supreme law of the land."<sup>10</sup> The restaurant refused to serve me because I am black. The boss fired me without giving me reasons, or a hearing. The shopping center stifled my political or religious speech (I was leafleting there) by having me removed from the premises as a trespasser. In every such case — there are no possible exceptions — the party charged with a constitutional violation has exercised, or is pleading, some right, power, privilege, or immunity conferred on that party either by statute or by common law. (Were that not so, said party either would be chargeable in an ordinary civil action with some tort, breach of contract, breach of trust, etc., or — if acting as plaintiff — would lack a cause of action upon which to sue.<sup>11</sup> The Constitution would never come into play.) Hence, to open the doors wide to judicial inspection of the common law for consistency with the Bill of Rights is to make the "state action" barrier to constitu-

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8. *Id.* at 265 (internal quotation marks omitted).

9. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.' . . . '[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.'" (Brandeis, J.) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372 (1910) (Holmes, J.); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J.)).

10. U.S. CONST. art VI.

11. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 28 YALE L.J. 16 (1913); Johan Van der Walt, *Perspectives on Horizontal Application: Du Plessis v. De Klerk Revisited*, 12 SAPR/PL 1, 6, 15, 21 (1997).

tional liability disappear.<sup>12</sup>

But *Sullivan* does throw the doors open, and there is no way logically — conceptually — to push them shut. Few American lawyers today would deny the Supreme Court's proposition in *Sullivan*, that the common law's being what it is at any moment, in any state, is no less the doing of that state than are the contents of that state's statute books. "The common law," we all have imbibed in the first year of law school "is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . . ."<sup>13</sup> But every litigation outcome necessarily turns on some claim of a right, power, privilege, or immunity said to be established either by statute or by common law. Plainly and inescapably, the state action doctrine is out of business.

True enough. Nevertheless, as we all know, something persists in our jurisprudence that walks and talks like a state action doctrine with teeth. Take, for example, *Evans v. Abney*.<sup>14</sup> The state courts of Georgia gave a devastatingly public effect to a testator's command to impose the regime of Jim Crow on certain parkland to be created out of his devise to the city of Macon.<sup>15</sup> On review, the U.S. Supreme Court could find no trace of a denial by the state of the equal protection of the laws. The Georgia courts had concluded that the will's racially discriminatory provisions were valid under — were authorized by — Georgia's general laws of testation. The U.S. Court could find no dishonesty or other fault

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12. See Johan Van der Walt, *Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence*, 17 S. AFR. J. HUM. RTS. 341, 348 (2001) ("[T]he most consistent position to take would be that one can never take the . . . involvement of the state out of . . . private legal relations, be these relations founded on statutory private law or common-law private law."); Johan Van der Walt, *Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga*, 19 S. AFR. J. HUM. RTS. 517, 536.

Note that a like jeopardy to the "state-action" doctrine is absent where the common law doctrine subjected to constitutional review has been invoked by the state as the basis for charges leading to punishment. See *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt-of-court conviction, based on common law, for incompatibility with constitutional protection of freedom of expression, with no mention of any "state-action" worries; cf. *S. v. Mambolo*, 2001 (5) BCLR 449 (CC), 2001 SACLR LEXIS 24 (same); Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 665 (CC), 1998 SACLR LEXIS 36 (subjecting common law doctrine defining a crime of sodomy to constitutional review).

13. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.).

14. 396 U.S. 435 (1970).

15. The Georgia courts enforced a forfeiture to private parties of land occupied by the major public park in the city of Macon, because the will by which the city had received the land in 1912, as construed by the Georgia courts, made continuation of the city's title perpetually contingent on exclusion of non-whites and the city had been barred from maintaining a racially exclusive facility by decisions following in the wake of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See *Abney*, 396 U.S. at 439; *Evans v. Newton*, 382 U.S. 296 (1966); *New Orleans City Park Imp. Ass'n v. Detiege*, 358 U.S. 54 (1958).

in that determination, and neither could it see any way in which those state laws offended against federal constitutional norms. The Georgia laws did not prohibit racially discriminatory conditions on devises, but neither did they require them.<sup>16</sup> That particular choice thus rested at the testator's doorstep, not the state's, and that fact was deemed conclusive against the plaintiffs' federal constitutional complaint.<sup>17</sup>

In standard American constitutional-legal lingo, the customary way to convey such a result is "no state action."<sup>18</sup> True, one always can recast such a decision (and no doubt more precisely) to say that of course there has been state action — the state obviously having made and carried out the law that gives legal force to the racist clause in the will — but none that contravenes constitutional norms. In fact, that comes pretty close to the *Abney* majority's own words, and they cited *Sullivan* to boot.<sup>19</sup> The careful phrasing was untypical, though. More usually, the Court falls into loose "state action" talk to explain its decisions denying the relevance of the federal Bill of Rights to ordinary-law, private litigation. Emblematic of the genre is *Flagg Brothers*.<sup>20</sup> "It would," our current Chief Justice there declared for the court,

intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that

16. See *Abney*, 396 U.S. at 439-44 (1970). In this respect, the case may have been more debatable than the majority opinion let on. Relying on Justice White's concurring opinion in *Newton*, 382 U.S. at 310, Justice Brennan's *Abney* dissent made the point that Georgia legislators, a few years prior to the making of the will in question, had enacted laws designed to clear away doubts that Georgia's common law of property permitted creation of perpetual, charitable trusts on racially exclusive terms. Brennan argued with some force that the state lawmakers thus had "single[d] out racial discrimination for particular encouragement," in contravention of the apparent equal-protection holding in *Reitman v. Mulkey*, 387 U.S. 369 (1967). See *Abney*, 396 U.S. at 457-58 (Brennan, J., dissenting).

17. See *id.* at 444-45.

18. See, e.g., *id.* at 450, 454 (Brennan, J., dissenting) ("The Court . . . affirms the judgment of the Georgia Supreme Court on the ground that the closing of Baconsfield did not involve state action . . . [because] . . . the Court finds that in this case it is not the State or city but 'a private party which is injecting the racially discriminatory motivation' . . .").

19. See *id.* at 444 ("We agree with petitioners that . . . no state law or act can prevail in the face of contrary federal law . . . ; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the state court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will.").

20. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (concluding that no deprivation by the state without due process of law has occurred when a warehouseman exercises unilaterally a summary power of sale of stored goods to collect storage fees allegedly due, under authorization by the state's enacted version of the Uniform Commercial Code).

body of law.<sup>21</sup>

Such denials, moreover, are commonplace. The *Sullivan* case is one of only a few in which the Supreme Court has used the Bill of Rights to nullify, override, or correct a piece of the common or "private" (or general background) law.<sup>22</sup> Our jurisprudence has displayed a marked reluctance to treat such law as the equivalent of "regulatory," statute law for purposes of Bill of Rights review.

### B. A Contrasting Example: South Africa

The situation differs in some other countries, including South Africa. That country's "final" post-transition Constitution went into force in 1996.<sup>23</sup> With it has come submission of common law doctrine

21. *Id.* at 160 n.10.

22. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), discussed *infra* note 124 and text accompanying; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (overturning on first amendment grounds a judgment against economic boycotters based on a state's common law of tort); *AFL v. Swing*, 312 U.S. 321 (1941) (holding that the federal constitutional guarantee of freedom of expression trumps state common law making it tortious for third parties to conduct peaceful picketing against an employer involved in a labor dispute). Compare *Retail, Wholesale & Dept. Store Union v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 (Supreme Court of Canada) (refusing to subject common law rules — in this case, a rule allowing for injunctions against secondary picketing — to direct Charter review, but adding that courts "ought" to develop common law principles to keep them consistent with "the fundamental values enshrined in the Charter"). See also *R.W.D.S.U. v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (Jan. 24, 2002), where the Supreme Court of Canada revised the common law rule applied in *Dolphin Delivery* to make it accord more comfortably with Charter values, but left in place the barrier against direct constitutional review of the common law.

In effect, *Marsh v. Alabama*, 326 U.S. 501 (1946), allowed provisions in the federal Bill of Rights to override the state's common law of property and tort in a contest between two nominally private parties. *Marsh* has since been confined to the never-again-to-be-seen case of a company town. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563-64, 569 (1972); *Flagg Bros.*, 436 U.S. at 158-59. The so-called "white primary" cases could be described as allowing provisions in the federal Bill of Rights to override state common law of contract and private association. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953). The reach of those cases is limited to settings in which states effectively delegate the conduct of elections of public officials to nominally private clubs.

*Shelley v. Kraemer*, 334 U.S. 1 (1948), does not qualify as an instance of the Court's subjecting state common law to Bill of Rights review. It would have, if the Court had addressed itself to the question of the compatibility of Missouri's common-law doctrine of equitable servitude, as applied in *Shelley*, with Fourteenth Amendment norms and concluded, as conceivably it might have, that the state law doctrine as applied there failed an equal-protection test because it gave racial covenants a free pass from certain legal restrictions typically applied to running covenants and servitudes, see, e.g., Carol Rose, *Property Stories: Shelley v. Kraemer*, in *PROPERTY STORIES* (G. Korngold & A. Morriss eds., 2004) 169, 177-86, 191-93. In fact, however, the Supreme Court's opinion had nothing to say about the compatibility of Missouri's law with the Fourteenth Amendment. The Court rather focused on the constitutional permissibility of coercive judicial enforcement of a racially discriminatory private arrangement that had been fashioned in the shelter of what might have been — indeed, was, for all the opinion had to say about it — a body of utterly race-neutral state contract law doctrine.

23. REPUBLIC OF SOUTH AFRICA CONSTITUTION OF 1996 [hereinafter SA CONST.]. The so-called "Interim" Constitution ("IC") of 1993 [hereinafter SA CONST., 1993] entered fully into

to Bill of Rights inspection, although not exactly as if such doctrine were a statute. The Constitution speaks directly to such a practice<sup>24</sup> and the Constitutional Court affirms it.<sup>25</sup> There has been controversy about whether Bill of Rights guarantees are ever to be “directly” applicable in a common law case involving only private parties, or, alternatively, application of the Bill of Rights in such cases always should be “indirect.”<sup>26</sup> The matter is now formally settled in favor of direct application sometimes and indirect application (as I understand the term) potentially always.<sup>27</sup> There remains some controversy over whether the “direct”/

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force at the time of the first democratic parliamentary and presidential election on April 27, 1994. The terms of the IC had been worked out in a protracted negotiation among contending political leaders, their seconds and advisers (including technical committees). The resulting agreement then was enacted into law by the old regime Parliament, in the form of an ordinary statute. See Act 200 of 1993, § 251(1). The “final” Constitution (“FC”) of 1996 was hammered out and adopted by a constitutional assembly consisting, in effect, of the newly democratic Parliament elected under auspices of the IC. See Act 108 of 1996. (The FC underwent review by the Constitutional Court for compliance with a set of broad “constitutional principles” contained in the IC.) For a concise review of this history, see Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC) ¶¶ 5-21. For closer studies of the underlying negotiations that make clear their robustly political component, see HASSAN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998); ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA’S ROAD TO CHANGE* (1995); RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA’S NEGOTIATED SETTLEMENT* (2000).

24. See SA CONST. § 8(2) (“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”); *id.* § 8(3)(a) (“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court . . . in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right . . .”); *id.* § 39(2) (“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”). See also *id.* § 8(1) (“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”); *id.* § 7(2) (“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”).

25. See, e.g., *Khumalo v. Holomisa*, 2002 (8) BCLR 771 (CC) ¶¶ 29-34, 2002 SACLR LEXIS 16; *Carmichele v. Minister of Safety*, 2001 (10) BCLR 995 (CC) ¶ [33] 2001 SACLR LEXIS 64 (“[W]here the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.”).

26. For a review of the controversy, see Halton Cheadle, *Chapter 3: Application*, in M.H. CHEADLE ET AL., *SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS* (2002).

27. Chris Sprigman & Michael Osborne, *Du Plessis is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15 S. AFR. J. HUM. RTS. 15, 30-36 (1999), argue that, contrary to first appearances, sections 8(1) and 8(2) of the 1996 Constitution convey no mandate for direct horizontal application. However that may be, the Constitutional Court ostensibly has affirmed direct horizontal application in at least one case. In *Khumalo*, *supra*, the CC gave what it called “direct horizontal application” to the Constitution’s free-expression guarantee “as contemplated by section 8(2) of the Constitution.” *Id.* ¶ 33. However, it is not clear how the Court’s action in that case differs from what Sprigman and Osborne (and others) have called indirect application. See *infra* notes 100-02 and text accompanying (discussing the *Khumalo* decision).



"indirect" distinction matters at all in practice, but that need not concern us here.<sup>28</sup>

For our purposes, you really need to know no more than the text of section 39(2) of the Constitution — "*When . . . developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*" — along with the fact that, despite the arguably optional wording ("when developing"), the Constitutional Court has held that judges in common law cases stand at all times under active obligation — at least when prompted by a party<sup>29</sup> — to consider whether claims and defenses pleaded before them would, indeed, be authorized by common-law doctrine if duly "developed" in the manner called for by section 39(2). The clearest such holding occurs in the widely noted case of *Carmichele v. Minister of Safety and Security*,<sup>30</sup> which also provides a vivid example of the difference constitutional inspection of the common law apparently can make for people's lives.

Carmichele's case will remind Americans of our *DeShaney* case.<sup>31</sup> Briefly: The plaintiff had been seriously injured in a sexual assault by a man free on bail pending trial on charges of a prior, violent sexual assault. She lodged a tort suit against the Minister, claiming that various police and prosecutorial officials under his charge both owed her a legal duty of protection and culpably had failed to perform it — their failure

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28. The issue conceivably could affect the set of cases in which, under the common law as the judiciary finds it to exist prior to any constitutionally mandated reinspection, a would-be plaintiff's claim of unlawful treatment by another would be subject to a motion to dismiss (as Americans would say) for failure state a claim on which relief can be granted. Suppose it is this very denial of a cause of action to a person complaining of a certain kind of treatment — say, another party's allegedly arbitrary refusal to hire her for an open position — that the aggrieved party wishes to contend is deviant from the spirit, purport, and objects of the Bill of Rights. It may be thought that, in order for any judicial officer to come under the constitutionally imposed obligation to develop this branch of the common law so as to remove the alleged deviance (which is what I take to be meant by indirect application of the Bill of Rights), some court first must become seized of the matter, and that this step is exactly what is prevented by the dismissibility of the would-be plaintiff's claim under the extant, pre-"constitutionalized" common law. If so, then it may seem that the only way to bring this dismissibility under constitutional review would be to treat the alleged wrongful injurer in the case — the boss who refused to hire the would-be plaintiff — as "directly" suable for a Bill of Rights violation. See, e.g., Van der Walt, *Perspectives*, *supra* note 11, at 11-12, 17 (relating that the author at one time advocated the necessity of direct Bill of Rights application to common-law disputes, but only because he then believed that there were such things as "extra-legal social relations" and only in this way could such relations be "brought within the ambit of the Constitution, should justice so require.") For perspicuous revision of that view, under Hohfeldian influence, see *id.* at 6, 15, 20-21; Van der Walt, *Co-operative Relation*, *supra* note 12, at 352-55; Johan Van der Walt, *Threshold*, *supra* note 12, at 534-37.

29. See note 39, *infra*.

30. *Carmichele*, 2001 (10) BCLR 995 (CC), 2001 SACLX LEXIS 64.

31. *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989).

consisting, in part, of refusal to oppose bail for the perpetrator when they had ample reason to know that he posed an immediate danger to women in the neighborhood. After hearing the plaintiff's evidence, the trial judge dismissed her claim as insufficient in law. The dismissal order was upheld by Supreme Court of Appeal ("SCA"), the tribunal that heads up what we roughly may call the common law branch of South Africa's judiciary.<sup>32</sup> According to South African common law, both courts held, police and other public officials do not in general owe any positive duty of protection to individual members of the public; such a duty may spring up when officials form special relationships with particular persons, but no such relationship existed in this case.<sup>33</sup> At no point did either the trial court or the SCA advert to any duty or power either body might have to "promote the spirit, purport, and objects of the Bill of Rights" by "developing" the common law in a direction favorable to the plaintiff's cause.

Precisely because of this oversight, the Constitutional Court ("CC") reversed the judgment of dismissal.<sup>34</sup> The Bill of Rights guarantees to "everyone" the "right" of "freedom and security of the person"<sup>35</sup> and it further specifies that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights."<sup>36</sup> In the CC's view, it was clear in the light of these texts<sup>37</sup> that section 39(2) demands reinspection of a body of common-law doctrine calling for dismissal of a case like *Carmichele*'s; moreover, the duty to provide such reinspection is incumbent upon any High Court<sup>38</sup> or appellate court before which such a case may come.<sup>39</sup> The CC reversed the High Court's order of dismissal and

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32. See Part IIIA for a more precise account of the SCA's jurisdiction.

33. For a concise account of the reasoning of the lower courts in *Carmichele*, see Van der Walt, *Threshold*, *supra* note 12.

34. *Carmichele*, 2001 (10) BCLR 995, ¶¶ 32, 39.

35. SA CONST. § 12(1).

36. *Id.* § 7(2).

37. The CC also referred to constitutional guarantees respecting life (§ 11) and human dignity (§ 10). See *Carmichele*, 2001 (10) BCLR 995, ¶ 44; and further, by clear implication, to the constitutional guarantee respecting equality (§ 9), see *id.* ¶ 57 (referring to the right, "in particular, . . . of women to have their safety and security protected").

38. *I.e.*, a trial court possessed of full, general jurisdiction. See SA CONST. §§ 169, 173.

39. See *Carmichele*, 2001 (10) BCLR 995 ¶ 39 ("It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) . . . that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.").

remanded the case for further proceedings.<sup>40</sup> On remand, the trial court did develop the common law in a manner leading to a judgment for the plaintiff,<sup>41</sup> and the SCA affirmed the judgment.<sup>42</sup>

One hardly can imagine a more dramatic instance of so-called indirect application of the Bill of Rights to a common law case and the difference it can make to parties and to society. Do you wonder what it is about this application that brings it under the heading “indirect?” Nothing, it may seem, but the fact that no party to the litigation has been found to have acted in a way defined by the Constitution as wrongful or substandard; it being only certain judges whose conduct the CC has criticized in terms of that kind.<sup>43</sup> Regarding the *Carmichele* defendants, the worst we possibly can say is that, in the result, they were held liable for a common law tort. In practical terms, of course, it is the defendants who suffer the consequences — and the plaintiff who reaps the benefit — of the penance imposed by the CC on the constitutionally errant judges. From the litigants’ point of view, and society’s at large for whom the law serves as a guide to future conduct, it hardly seems to matter that application of the Bill of Rights to the case-at-bar has been “indirect,” not “direct.” And yet the difference does seem to matter to some members of another class of significant stakeholders in South African law, as we shall see.<sup>44</sup>

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40. See *id.* ¶¶ 83-84.

41. See *Carmichele v. Minister of Safety & Sec.*, 2002 (10) BCLR 1100 (C). It will be of interest later that CC did not see fit to undertake by itself the requisite reinspection of the common law. See Part IVB.

42. See *Minister of Safety & Sec. v. Carmichele*, Case No. 533/02, decided Nov. 14, 2003 (Supreme Court of Appeal of South Africa), available at <http://wwwserver.law.wits.ac.za/sca/files/53302/53302.pdf> (last visited March 3, 2004). Whether the SCA’s opinion is best read as resting the affirmance on a “developed” common law claim, or rather as resting it on a claim directly rooted in public (and possibly constitutional) law, is a question I must leave to trained South African lawyers.

43. Cf. Van der Walt, *Co-operative Relation*, *supra* note 12, at 348 (pointing out that, in the German version of indirect constitutional review in private-law cases, reviewing courts never suggest that “a [constitutional] right was violated by a private legal subject;” rather, the “violation” is always described as an error of legal interpretation committed by a trial judge.) Compare Halton Cheadle & Dennis Davis, *Chapter 1: Structure of the Bill of Rights*, in CHEADLE ET AL., *supra* note 26, § 1.2 (“The first premise is that a constitution is primarily concerned with the making, the content and the application of rules. In this respect, the Bill of Rights in the final Constitution is no different. Its primary emphasis is in respect of rules and not conduct. Conduct may give rise to the testing or development of a rule under the Bill of Rights but should never, itself, be the subject of constitutional enquiry.”).

44. See Part IVA. Stephen Ellmann points to two potentially significant, systemic differences between direct application of a constitutional mandate to a private dispute and development of applicable common law to keep it acceptably attuned to the Constitution’s principles and values. First, a direct application might, at least sometimes, necessarily convey a specific, judicially endorsed rule of constitutional law that Parliament would be powerless to alter save by formal constitutional amendment, whereas a judicial choice regarding common law development would often leave Parliament with room to impose a different choice that the courts also would find

### C. *Plan of the Article*

So far, we have noticed the reluctance of U.S. courts to subject common law doctrine to constitutional-normative assessment, and contrasted it with the readiness and, indeed, the constitutionally imposed obligation of the South African judiciary to do exactly that. In what follows, we shall look more closely at both terms in the comparison, especially the South African. As we do so, we shall draw some connections between what our more refined, comparative review discloses and the scholarly work of Owen Fiss. Here, roughly, is the plan: First, we notice how a major theme in Professor Fiss's work suggests that he should be warmly receptive to the South African development I have just been describing. Next, we notice a reason, not particularly drawn from Fiss's work but from more general considerations, why he might nevertheless feel some caution regarding it.

Finally, I shall point out that this more general consideration falls short of being able to explain a certain feature in the South Africa picture, which is this: Within the formal set-up represented by South Africa, in which Bill of Rights inspection of common-law doctrine is constitutionally mandated and judicially embraced, common law is treated, it seems — sometimes, by some practitioners — with a distinct sort of respect, *as common law*.<sup>45</sup> Such a posture of distinct respect for the common law may look surprising at least to this extent: It is only statute law, after all, not common law, that can claim whatever measure of deference may be owing to the judgments and choices of a democratically accountable Parliament.<sup>46</sup> I shall end this article by suggesting that underpinnings for an attitude of distinct regard for the common law can be found in Owen Fiss's scholarship.

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acceptable. See Stephen Ellmann, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights to Private Actors*, 45 N.Y.L. SCH. L. REV. 21, 45 (2000-2001); Sprigman & Osborne, *supra* note 27, at 15, 28-29, 36, 42. Second, a finding of direct violation of the Constitution might have a sharper stigmatizing and deterrent on the class of conduct in question than would a finding of common law violation. See Ellmann, *supra*, at 47.

45. See Part IVB.

46. See *Bridges v. California*, 314 U.S. 252, 260-61 (1941) ("a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But . . . the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' . . . For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation." (citations omitted)).

## II. FROM CONSTITUTIONAL PURPOSE TO THE FREEDOM-FRIENDLY STATE

We began this article by noticing what seems an impeccable, conceptual argument for laying the common law wide open to Bill of Rights inspection, once judicial constitutional review of statutes is in place. We next turn to a different sort of argument for doing so, one that is functional and ideological. This argument is easily gleaned from the work of Owen Fiss. He should approve it.

In the Fiss canon on constitutionalism and constitutional law, a constant and dominant theme is the thesis, as I shall call it, of the freedom-friendly state. (I have in mind Fiss's remark that whereas liberals used to view the state as "a natural enemy of freedom," these days we are learning to "imagine the state as a friend of freedom."<sup>47</sup>) As I am about to reconstruct it, the freedom-friendly state thesis emerges in a series of four claims.

The first and most basic claim is that the point of a constitutional bill of rights is to direct and constrain political practice toward the fulfillment, for everyone, of certain super-valued interests attributed to every person just as such. More extensively stated, the purpose is to commit all future lawmakers, and other future operators of the country's legal system, to the achievement of a social state of affairs in which not only to do direct infringements of the super-valued interests not occur with any frequency, but everyone is enabled to realize and enjoy the "worth" or "fair value" of these interests.<sup>48</sup> In the purest form of this view, a constitutional bill of rights simply is a tool or device in a human rights project. Not only does it aim at actual access by persons to the enjoyment of super-valued interests, it does so strictly for the sake of those persons, out of concern and regard for them. In Ronald Dworkin's terms, the project is "right-based," not "goal-based."<sup>49</sup>

Fiss does not advocate such a cleanly right-based view. There can be goal-based, social-systemic reasons for being attentive to inequalities in the actual conditions of persons with respect to enjoyment of their rights or super-valued interests. As any casual reader of Fiss's First Amendment essays<sup>50</sup> will know, our man sees the Constitution as concerned with the distribution of the actual exercise and enjoyment of free-

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47. Owen M. Fiss, *The Many Faces of the State*, 6 REV. CONST. STUD. 1, 7 (2001).

48. See JOHN RAWLS, *A THEORY OF JUSTICE* 204 (1973); Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 97 (1992).

49. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 171-73 (1986).

50. The main collections are OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) and OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996). Specific formulations I cite below have often been taken, as indicated, from more recent essays relying on the earlier ones.

speech rights, primarily for the sake of good government — robust and open public debate — and only, perhaps, “incidentally”<sup>51</sup> for the sake of individual well-being.<sup>52</sup> The point on which I insist is that Fiss nevertheless has seen as normatively crucial the question of the *right of every* person to full enjoyment of the interests guaranteed by our Bill of Rights.<sup>53</sup> His defenses of both hate-speech regulation and controls on electoral spending proceed on the assumption that securing every individual’s entitlement — as a right — to the actual enjoyment and exercise of freedom of speech is the underlying point and purpose of the First Amendment.<sup>54</sup>

The foregoing is by no means a self-evident or uncontested proposition.<sup>55</sup> An individual-rights project is one thing, a limited-government project is another, and constitutional bills of rights easily may be understood, and often have been, as strictly a tool or device of the latter. The point and purpose of a bill of rights, then — as of constitutionalism in general — would be to keep a potentially oppressive and tyrannical government under restraint.<sup>56</sup> The harms and pains to be avoided would be those that persons will suffer if the bill-of-rights fetters on *government* fail, along with other institutional checks and balances. If that is your view of what the Bill of Rights is mainly about — if shackling the state is what you take to be the driving purpose — then Fiss’s arguments will not work for you.<sup>57</sup>

The second claim in the chain leading to the freedom-friendly state thesis follows directly on acceptance of the first. It is that the highly

51. See Owen M. Fiss, *A Freedom Both Personal and Political*, in JOHN STUART MILL, ON LIBERTY 179, 183 (David Bromwich & George Kateb eds., 2002).

52. See, e.g., Owen M. Fiss, *The Idea of Political Freedom*, in LOOKING BACK AT LAW’S CENTURY 36 (Austin Sarat et al. eds., 1999); Owen Fiss, *Free Speech and Social Structure*, in LIBERALISM DIVIDED, *supra* note 50, at 7, 29-30. See also Fiss, *Personal and Political*, *supra*, at 183-84, where Fiss distinguishes J. S. Mill’s “primarily personal, as opposed to political” defense of freedom of speech from the rationale he ascribes to the Constitution. “Whereas,” Fiss writes, “for Mill freedom of speech was essential for the full development of the individual personality,” the framers valued this freedom “for the contribution it makes to the workings of the democratic system.” For a right-based theorist’s denial that this represents the best way of looking at the First Amendment, see RONALD DWORKIN, FREEDOM’S LAW ch. 8 (1996).

53. See Fiss, *Political Freedom*, *supra*, at 36 (speaking of “a right that the individual enjoys as a member of the community and that is essential to the effective functioning of that community”); *id.* at 37 (asserting that the freedom conferred by the First Amendment “belongs to individuals as participants in the political system . . . , because it serves the needs and interests of that system”); *id.* at 42 (same).

54. See, e.g., Fiss, *Many Faces*, *supra* note 47, at 5-6.

55. It is, however, a proposition with which I am in declared agreement. See Michelman, *Fair Value*, *supra* note 48, at 94.

56. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

57. Fiss expressly distinguishes his view of the aim of a Bill of Rights from one based on an “antitotalitarian principle.” Fiss, *Political Freedom*, *supra* note 52, at 38.

valued interests of persons that bills of rights (according to the first claim) are meant to secure against infringement stand roughly in as much danger of infringement by other natural persons and private organizations, exercising rights, powers, privileges, and immunities conferred on them by general law, as they stand in danger of infringement by lawmakers and officials exercising the special powers of the state.<sup>58</sup> Owners of regional shopping centers repress speech as much by invoking the common law of trespass against those who wish to leaflet on the premises as city officials would by closing the public sidewalks to leafletters.<sup>59</sup> The phenomenon is not limited to the hackneyed shopping-center example, but rather extends as far abroad in social life as the content of a given bill of rights will let it. Suppose everyone has a constitutionally super-valued interest in earning a living or in free choice of trade, occupation, or profession.<sup>60</sup> Employers exercising firing powers under at-will employment contracts may threaten those interests as gravely as state lawmakers do when they regulate trades and professions. Suppose everyone has a constitutionally super-valued interest in having "access to sufficient food and water."<sup>61</sup> Food-sellers exercising powers under the law of contract to set highly profitable prices for their wares, and landowners exercising rights and privileges under the law of property to convert land from food production to game parks, may threaten those interests as gravely as any state official ever would be likely to do.

Consequently, the third claim in the chain leading to the freedom-friendly-state thesis is this. It makes no sense to refuse application of bill of rights guarantees to cases in which infringements of constitutionally super-valued interests of persons are wrought by private agents exercising rights, powers, privileges, and immunities conferred on them by general or common law,<sup>62</sup> as distinguished from cases in which the infringements come directly from officials wielding the force of the state, or exercising special rights, powers, privileges, or immunities<sup>63</sup> reserved to the state and its officials.<sup>64</sup>

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58. See, e.g., *id.* at 50 ("[P]rivate actors can threaten public debate just as much as state actors" and "the state may sometimes be the only power in society keeping these forces at bay.").

59. See, e.g., *New Jersey Coalition Against the War v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994) (reasoning thus in concluding that the free-expression guarantee of the New Jersey Constitution overrides the common law of trespass in such a case).

60. See SA CONST. § 22.

61. *Id.* § 27(1)(b).

62. See *supra* notes 11-12 and text accompanying.

63. Hereinafter simply "powers."

64. See, e.g., Fiss, *Political Freedom*, *supra* note 52 at 51 (noting how a recognition of the state's affirmative duty to secure everyone's political freedom would obliterate the "state action" issue from the shopping-center cases). For direct counter-argument, see Charles Fried, *Perfect*

The fourth claim — we can call this the freedom-friendly state thesis proper — takes an additional step. It says that the Bill of Rights imposes active obligations on the state to make sure that its deployments of its special powers are duly attuned to the aim of protecting persons effectively against privately wrought infringements of their constitutionally super-valued interests. Since the state's special powers obviously include powers to decide from time to time what the law is, it follows that courts assessing the constitutionality of government lawmaking ought to take this active obligation into account. Had our Supreme Court done so in *Buckley v. Valeo*,<sup>65</sup> for example, it might not have been so quick to condemn as unconstitutional a congressional enactment that ostensibly and plausibly was designed to protect the effective political speech of everyone by restricting the political expenditures of the wealthy. The Court's avowed premise was that "the concept that the government may restrict the speech of some in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."<sup>66</sup> That premise is miscast, in Fiss's view. The Court went wrong, he maintains, by treating the case as one where Congress sought to restrict liberty for the sake of equality. If, instead, the case had clearly been framed by the Court as one of liberty versus liberty — Congress acting to protect the public interest in "collective self-governance" that is served by securing the fair values of some people's constitutionally super-valued liberties against infringement by other people's exercise of their own parallel liberties — that framing would have made it much harder for the Court to override a congressional judgment about where to strike the balance.<sup>67</sup>

In sum: The state may be one source of threat to our constitutionally protected interests, including our interests in freedom, but it is not the only one and it also is the savior of last resort for those interests against the threats posed to them by powerful agents in civil society.<sup>68</sup> That is the freedom-friendly state thesis in a nutshell.

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*Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 736-41 (1998); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234-37 (1992).

65. 424 U.S. 1 (1976).

66. *Id.* at 48-49.

67. See, e.g., Fiss, *Many Faces*, *supra* note 47, at 5-6 (urging the view that "equality is not just a separate value but also a part of free speech itself").

68. Recognition of the state's dual role as threatener and savior of last resort has cropped up elsewhere in American constitutional theory, in sundry guises. Consider, for example, Joseph Sax's widely noted distinction between the "enterprise" and "arbitral" capacities in which a state may act when it regulates the use of privately held land — Sax urging that action in the former role, but not the latter, exposes the state to a possible liability for an uncompensated taking of property prohibited by the Fifth Amendment. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). For discussion of puzzles arising out of recognition that the state may act as threatener of protected interests through the very acts it takes as protector of them against



### III. CONSTITUTIONAL INSPECTION OF THE COMMON LAW: A BOON FOR FREEDOM?

In some countries across the world — South Africa is our example, but there are others — the official position is that common law doctrine is substantially open to inspection for compatibility with a constitutional bill of rights.<sup>69</sup> I would bet that most American legal thinkers of the egalitarian-liberal persuasion, people like Owen Fiss and me — call us “Brennan liberals”<sup>70</sup> — cannot help cheering such a choice and yearning for the same to happen here. Think of how we feel about *DeShaney*, for example — recall Justice Brennan’s dissent in that case<sup>71</sup> — and contrast South Africa’s *Carmichele* decision. Brennan liberals instinctively will nod in agreement with the South African academic commentator who remarked that introduction of “constitutional review of . . . private law relations,” had it occurred in the United States, “could have brought about a radical democratisation of the law.”<sup>72</sup>

American Brennanites are conditioned by experience to react in this way. If the South African development were copied here, that apparently would do away with all trace of a “state action” barrier to legal relief in the name of the Bill of Rights,<sup>73</sup> and we’ve been taught — or we have taught ourselves — to see that barrier as tendentiously inimical to the causes we favor. In every case that jumps to mind in which the Supreme Court has found state action after visibly straining to do so, its doing so has allowed our “side” to prevail.<sup>74</sup> In every case that jumps to

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infringement by private actors, see Jeremy Paul, *The Hidden Structure of Takings Law*, 64 So. CAL. L. REV. 6 (1991).

69. See, e.g., Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT. J. COMP. L. 79 (2003), and authorities cited; JOHAN VAN DER WALT, TANGIBLE MAIS INTOUCHABLE, LA LOI DU TACT, LA LOI DE LA LOI: THE FUTURE AND FUTURITY OF THE PUBLIC-PRIVATE DISTINCTION IN THE VIEW OF THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS 106-08 & n.23 (2002); Ellmann, *supra* note 44, at 37-40 n. 52 (2000-2001) (presenting an extensive and detailed survey of the pertinent constitutional law of numerous jurisdictions, including the jurisdiction constituted by the European Convention on Human Rights).

70. See FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 119-21 (1999).

71. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 203 (1989).

72. VAN DER WALT, FUTURE AND FUTURITY, *supra* note —, at 108 n. 133. Professor Van der Walt continues: “[T]he horizontal application of fundamental rights can be said to represent a revolutionary voice in contemporary societies.” *Id.* at 109. His full view is more complex and guarded, however. See *infra* text accompanying notes 62-68, 182.

73. See Part IA.

74. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Pennsylvania v. Bd. of Dir. of City Trusts*, 353 U.S. 230 (1957); *Terry v. Adams*, 345 U.S. 461 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946).

mind in which the Court has declined to find state action when it easily could have done so, it has thereby deprived our side of victory.<sup>75</sup> This simple fact may help explain why bashing the public-private distinction has been a long-standing project of the American legal-academic left.<sup>76</sup>

In Parts IA and II, I presented conceptual and ideological arguments to the effect that common law ought to be no less subject than statute law to judicial inspection for consonance with the requirements of a constitutional bill of rights. In this Part, I ask how eager, really, Brennan liberals should be to see such arguments put into practice. We shall have to work through a few preliminaries before reaching the main question.

### A. *The Notion of a Common-Law Judiciary*

As we shall see,<sup>77</sup> the main question devolves largely to one about whether reasons for distrusting the lawmaking products of legislatures apply in the same way and degree to the lawmaking products of a common law judiciary. Now, for the question in that form really to bite, it must be the case that there *is* a common law judiciary, existing separate and apart from the constitutional judiciary that sits in judgment of the constitutional merits of legislation and possibly — this is our question — of the common law. (If the constitutional and common law judiciaries were one and the same, why would we worry about the question?)

As it happens, the condition of institutional separation of the common-law from the constitutional judiciary is substantially satisfied in both the United States and the country we have chosen for comparison, South Africa. In South Africa, the separation is not-quite-expressly dictated by the Constitution, and the gap is filled by an apparent practice of the Constitutional Court.<sup>78</sup> By constitutional provision, South Africa has two pinnacle courts, the Supreme Court of Appeal (“SCA”) and the Constitutional Court (“CC”). The former serves as the country’s court of last resort in all matters not involving interpretation or application of the Constitution.<sup>79</sup> The SCA thus sits at the apex of the common-law judi-

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75. See *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Evans v. Abney*, 396 U.S. 435 (1970). Cf. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (refusing to allow a *Bivens* action against a private entity performing a government-like function — detention as punishment for crime — under government authorization); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (construing Civil Rights Act).

76. See, e.g., *A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

77. See Part IVB.

78. See *infra* notes 82, 202-03 and text accompanying.

79. See SA CONST. § 168(3) (“The Supreme Court of Appeal . . . is the highest court of appeal except in constitutional matters.”).

ary. The CC has the last word in matters touching the Constitution,<sup>80</sup> but its jurisdiction correspondingly is limited to such matters.<sup>81</sup> Thus, the only way the CC possibly could adjudicate in a common-law case would be by reviewing the work of the SCA and lower courts for compatibility with constitutional standards and requirements.<sup>82</sup> The net practical result is that there is full institutional separation between common-law and the constitutional judiciaries in South Africa.

The situation in the United States is virtually the same, even though our Supreme Court's jurisdiction is not limited to constitutional questions.<sup>83</sup> The key, of course, is our federalism. No ghost of *Swift v. Tyson*<sup>84</sup> walks the land. There being no "federal general common law,"<sup>85</sup> it can only be the common law of some state that, almost without exception, must supply a substantive rule of decision for non-statutory cases tried in federal courts.<sup>86</sup> Consequently, our national Supreme Court today regards itself as powerless to pronounce on garden-variety, common law questions of tort, contract, property, and restitution, saving those rare moments when the Court, exceptionally, regards the common law decision-making of state courts as trenching on federal constitutional-legal supremacy.<sup>87</sup> To all intents and purposes relevant to this article, the situation parallels South Africa's.

80. See *id.* § 167(3)(a), (c) ("The Constitutional Court — (a) is the highest court in all constitutional matters; . . . and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.").

81. See *id.* § 167(b) ("The Constitutional Court . . . (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters."). The CC has developed an expansive conception of the category of "constitutional matters." See *Pharmaceutical Mfrs. of South Africa: In re Ex parte President of the Republic of South Africa*, 2000 (2) BCLR 241 (CC); Ellmann, *supra* note 44, at 49 n.85.

82. The waters are muddied a bit by the inclusion of a constitutional provision granting the CC, along with other courts, an "inherent power" to "develop the common law, taking into account the interests of justice." SA CONST. § 173 ("The Constitutional Court, Supreme Court of Appeal and High Courts [i.e., the main *nisi prius* courts] have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."). Reading this text *in pari materia* with section 167(b), one easily might conclude that the CC's "inherent" power of common-law development is exercisable only in aid of its power of constitutional review of the work of lower courts, as in *Carmichele*. The CC so far has skirted the question, by following a policy that the substantive work of common-law development under mandate of section 39(2) ought usually to be left in the first instance to the SCA and lower courts. See Part IVB.

83. See U.S. CONST. art. III, § 2.

84. 41 U.S. (16 Pet.) 1 (1842), *overruled*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

85. *Erie*, 304 U.S. at 78.

86. See *id.*

87. See *supra* note 22 and text accompanying. We may assume — although the matter is contested — that a common lawmaking power continues to be recognized in the federal judiciary for a few special classes of cases and problems. See, e.g., Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. REV. 223, 236-38 (2003). It makes no difference for purposes of this article.

### B. *The Common Law As Facilitative*

As we have seen, the freedom-friendly state thesis of Owen Fiss implies a demand to bring common-law (or “private law”) doctrine within range of judicial constitutional review for compatibility with the guarantees of the Bill of Rights. The thesis demands that the state deploy its special powers, including lawmaking powers, with a view to minimizing privately engineered infringements of constitutionally super-valued interests of persons; and such private infringements, when they occur, often will be wrought by persons exercising rights, powers, privileges, and immunities conferred on them by the common law.<sup>88</sup> Assessing claims of constitutionally intolerable, privately engineered infringement, then, inevitably will involve courts in assessment of common-law doctrines against standards drawn from the country’s constitutional bill of rights.

Does it matter that a great deal of common-law doctrine is perceived as “facilitative,” not “regulatory?” We see this law as providing background rules and transactional frameworks, by and within which free private agents in a broadly speaking market society are enabled to order their own affairs and relations as they see fit. Standard examples are the law of trespass, the law of battery, the law of fraud, the law of adverse possession, the law governing contract formation, the law governing testation, and the law governing private associations. In *Evans v. Abney*,<sup>89</sup> for example, the Court twice emphasized that the relevant Georgia laws of trust and testation were “long standing and neutral with regard to race.”<sup>90</sup> A great deal of the private law *corpus juris* — undoubtedly the major fraction of it — shares this look of being policy-neutral and transparent to diverse private purposes. Does it follow, from these apparent attributes of neutrality and transparency in the bulk of the common law, that the bulk of the common law can be exempted categorically from inspection for compatibility with what the South Africans call “the spirit, purport, and objects” of the Bill of Rights?<sup>91</sup> It does not, certainly not in the eyes of anyone committed to the freedom-friendly state thesis.

In the view of the freedom-friendly state thesis, the neutrality and

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88. Or by that law as modified and codified by background-law statutes such as the Uniform Commercial Code, the Uniform Simultaneous Death Act, and the like. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (refusing to find state action in a warehouseman’s exercise of its summary power of sale of stored goods, to satisfy a warehouseman’s lien, as provided by the state’s enacted version of the U.C.C.).

89. 396 U.S. 435 (1970).

90. See *id.* at 444, 446.

91. See SA CONST. § 39(2) (directing courts engaged in “developing” the common law to do so in a manner designed to “promote” the spirit, purport, and objects of the Bill of Rights).

transparency of a given piece of common law doctrine may be the very feature that makes the doctrine constitutionally questionable. For Americans, the classic example comes from the fountainhead of the state action doctrine, the *Civil Rights Cases*.<sup>92</sup> Do innkeepers and common carriers enjoy a common-law right and privilege to extend and refuse service on a race-discriminatory basis, or are they rather under duties to serve all comers on like terms? It appears that the common law on the point goes one way in some states and the other way in others, and that in some states it has switched historically from one way to the other.<sup>93</sup> The common law, in other words, has a choice to make in this field, as it always, inevitably, has in all fields (Hohfeld's lesson<sup>94</sup>). Now, a choice to grant establishment owners the right and privilege of serving whom they will on terms they choose will have exactly those attributes of neutrality and transparency I have mentioned. And yet, as legislatures all over this land have perceived, that neutral and transparent setting of the common law rule, in our country in our historical situation, quite reasonably can be judged antithetical to the spirit, purport, and objects of the Thirteenth and Fourteenth Amendments.<sup>95</sup> Conformity might require alteration of a common law rule to put specific public policy quite explicitly into it. The freedom-friendly state thesis is hard to repress.

The point is general, not limited to situations as egregious as Jim Crow. In fact, its potential range of application has no natural limit at all. Let me cite a few examples from South Africa. All of the cases I am about to mention have made their ways to that country's highest appellate levels and have been treated very seriously. (1) Plaintiffs harmed by use of a drug sued the manufacturer on a theory of strict liability, although South African common law to date had rejected strict liability for drug manufacturers. The plaintiff maintained that the rule refusing strict liability is fatally at odds with the Constitution's guarantee to everyone of the right to "bodily and psychological integrity."<sup>96</sup> The SCA rejected this claim after careful consideration, taking note that the common-law doctrine of *res ipsa loquitur* often relieves plaintiffs of

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92. 109 U.S. 3 (1883).

93. See generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U.L. Rev. 1283 (1996).

94. See Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711, 755 (1980); Van der Walt, *Perspectives*, *supra* note 11, at 14-15.

95. See, e.g., Civil Rights Act of 1964, Title II, 42 U.S.C. §§ 2000 et seq.; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964) ("The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution."). See also *id.* at 257 ("In framing Title II of this Act Congress was . . . dealing with what it considered a moral problem," and not just with burdens on interstate commerce.).

96. SA CONST. § 12(1).

having to marshal positive evidence of negligence, even where, in principle, liability is fault-based.<sup>97</sup> (2) A private hospital included in its boilerplate agreement with admitted patients a clause exempting the hospital from liability for harms resulting from the negligence of staff members. A patient sought to have this exculpatory clause set aside, on the ground that giving effect to such a clause — as established common-law doctrine would do — would be out of keeping with the “spirit, purport, and objects” of the Bill of Rights insofar as it confers on everyone a right of access to health care services.<sup>98</sup> The trial court agreed and set aside the exculpatory clause, but the Supreme Court of Appeal reversed.<sup>99</sup> (3) A newspaper charged a private adversary, in effect, with infringing the paper’s constitutional right of freedom of expression by asserting, in court, a common-law right to recover damages for defamation without having to prove the falsity of the offending publication.<sup>100</sup> This charge was rejected by the Constitutional Court, but only after the Court had satisfied itself that the common law of defamation — as recently adjusted by the country’s common-law judiciary in light of the new Constitution<sup>101</sup> — gave due weight not only to the Constitution’s conferral on everyone of the right to protection of their dignity but also its conferral on everyone of the right to freedom of expression.<sup>102</sup> (4) The male life-partner of a man tortiously killed claimed a right to recover damages for loss of support. Pre-existing common law allowed for such recovery by spouses only. The SCA concluded that the common law must be developed to encompass recovery by a surviving partner in a same-sex union, because (among other reasons) such a development would be “in accordance with the behests of the Constitution.”<sup>103</sup> (5) A lesbian couple challenged the common law rule restricting marriage to opposite-sex unions as dissonant with constitutional

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97. See *Wagener v. Pharmacare Ltd.*, Case No. 32-2002 (March 28, 2003) (SCA). The judgment can be found at [http://wwwserver.law.wits.ac.za/sca/judgment.php?case\\_id=12332](http://wwwserver.law.wits.ac.za/sca/judgment.php?case_id=12332) (last visited July 17, 2003).

98. See SA CONST. § 27(1)(a).

99. See *Afrox Health Care v. Strydom*, 2002 (6) SA 21 (SCA).

100. See *Khumalo v. Holomisa*, 2002 (3) SA 38 (T). The defendants sought a “direct” application of the Bill of Rights to the plaintiff’s actions, but what act of the plaintiff’s could have amounted to a violation of constitutional norms? It would have to have been the plaintiff’s act of exercising his common-law power to subject the defendants to the costs and hazards of a defamation suit, under rules — for such the plaintiff claimed they were — that leave defendants bearing the risk of non-persuasion on the truth issue.

101. See *National Media v. Bogoshi*, 1999 (1) BCLR 1 (SCA), 1998 SACLR LEXIS 37.

102. See *Khumalo v. Holomisa*, 2002 (8) BCLR 771 (CC), 2002 SACLR LEXIS 16; SA CONST. §§ 10 (dignity), 15 (freedom of expression). The CC noted that the remodeled defamation doctrine allows not only an affirmative defense that the publication is true and in the public interest, but also an affirmative defense that the decision to publish was reasonable. See *Khumalo*, *supra* ¶¶ 39, 43.

103. *Du Plessis v. Road Accident Fund*, 2003 (11) BCLR 1220 (SCA) ¶ 34, 2003 SACLR

guarantees respecting equality and dignity. Their claim was dismissed by the High Court.<sup>104</sup> They appealed directly to the Constitutional Court, which dismissed the appeal, but only on the ground that the matter should be taken first to the Supreme Court of Appeal.<sup>105</sup> There are other instances, and new ones keep cropping up. How large the iceberg eventually may prove remains to be seen.

### C. *Interlude: A Cautionary Tale*

During the period leading up to the U.S. Supreme Court's issuance of its 1857 decision in *Dred Scott v. Sandford*,<sup>106</sup> a very precise question divided the new Republican party — which Abraham Lincoln soon would head — from the Northern wing of the Democratic party led by Senator Stephen A. Douglas. The question was: ought Congress to enact laws to keep the remaining western territories of the United States slavery-free prior to statehood? Republicans said yes, and this answer, in fact, was a chief proposition around which the party recently had organized itself.<sup>107</sup> Democrats defended, instead, a policy based on a principle of local political self-determination or "popular sovereignty," according to which the populations in each organized territory should settle for themselves, by political means, the legal status of slavery within their respective borders, pending statehood.<sup>108</sup> According to widespread perception, the Democratic Party had largely succeeded in enacting their policy into law by the Kansas-Nebraska Act of 1854.<sup>109</sup> Republicans were in the position of campaigning for a legislative reversal by getting themselves elected to the House, the Senate, and, eventually, the White House.<sup>110</sup>

On the face of it, the Supreme Court's *Dred Scott* decision ought to have brought this controversy to a standstill. The Court had concluded

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LEXIS 42; see SA Const. § 9(3) (prohibiting unfair discrimination, direct or indirect, against any person on any of several grounds, including the ground of sexual orientation).

104. See *Fourie v. Minister of Home Affairs*, 2003 (10) BCLR 1092 (CC), 2003 SACLR LEXIS 45, ¶¶ 1-3 (describing lower-court proceedings).

105. See *Fourie*, *supra*, ¶¶ 12-13.

106. 60 U.S. 393 (1857).

107. See WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY 1852-56*, at 335 (describing the platform adopted at the first Republican national nominating convention in 1856); *id.* at 267-69 (describing controversy over whether the Republican Party would demand abolition of slavery from territories where it existed or would merely demand exclusion of slavery from territories where it had not yet entered).

108. Lincoln, you may be sure, had plenty of good rhetorical sport with the idea that white-majoritarian choice in favor of slavery was an application of a moral principle in favor of self-government. See, e.g., 2 *COLLECTED WORKS OF ABRAHAM LINCOLN* 265-66 (Roy P. Basler ed., 1953) (speech at Peoria, Illinois, Oct. 16, 1854).

109. See 2 ALLAN NEVINS, *ORDEAL OF THE UNION* 95 (1947).

110. See, e.g., *COLLECTED WORKS*, *supra* note 108, at 272-73.

that neither Congress nor a pre-statehood, territorial legislature could make a valid law excluding slavery from a territory. The cited basis for this ruling was the Fifth Amendment's command against depriving any person of property without due process of law, combined with the Court's observation that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."<sup>111</sup> Whatever one might think of that observation and of that reasoning, the Republican policy, it seemed, was stymied by the *Dred Scott* ruling.

In his speeches, Lincoln sought to evade that conclusion by arguing that the Supreme Court's reasoning in *Dred Scott* was so deeply and flagrantly flawed that the conclusion against congressional power ought not yet to be considered settled constitutional law, binding on other governmental branches that might conscientiously disagree.<sup>112</sup> It would be perfectly in order, Lincoln implied, for Congress to try again with free-soil legislation for the territories, thus pressing the Court to reconsider. This suggestion drew charges from Senator Douglas that it displayed a dangerous tendency toward "mob law"<sup>113</sup> (a view reminiscent, by the way, of one that Lincoln himself had publicly declared some years earlier<sup>114</sup>). Thus the stage was set for one of the most famous episodes in the Lincoln-Douglas stump debates of 1858.

In the second debate, at Freeport, Illinois on August 27, Lincoln put to Douglas the following question: "Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State constitution?"<sup>115</sup> The question probably was meant to pose a dangerous dilemma for Douglas. It seems that by answering "no," Douglas would take two, related risks. First, a "no" answer would force Douglas and his fellow Northern Democrats to forgo highfalutin appeals to a

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111. 60 U.S. at 451-52. The Court referred to the fugitive slave clause, U.S. CONST. art. 4, §2, cl. 3, and the thirty-year ban on congressional action respecting the importation of slaves. *Id.* art. I, § 1, cl. 9. The Court went on to declare that the Constitution's affirmation of the said right is done in plain words — too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

*Id.* at 452.

112. See, e.g., 2 COLLECTED WORKS, *supra* note 108, at 400-04 (Speech at Springfield, Illinois, June 26, 1857).

113. See, e.g., 3 COLLECTED WORKS, *supra* note 108, at 142-44 (Speech of Senator Douglas at Jonesboro, Illinois, Sept. 15, 1858).

114. See 1 COLLECTED WORKS, *supra* note 108, at 112-13 (Address Before the Young Men's Lyceum of Springfield, Ill., Jan 27, 1838).

115. See, e.g., 3 COLLECTED WORKS, *supra* note 108, at 43 (Speech at Freeport, Ill., Aug. 27, 1858).



principle of political self-determination ("popular sovereignty") as an excuse for not opposing outright any further spread of slavery in the territories.<sup>116</sup> Second, a "no" answer would risk antagonizing the substantial numbers of free-soil minded Northerners who still, at that time, retained their ties to the Democratic Party. On the other hand, a "yes" answer to Lincoln's question might be equally dangerous for Douglas. Not only would it undermine Douglas's charges against Lincoln of lawless disrespect for the Supreme Court; it also would tend to "split[ ] Douglas from" his support among Southern-sympathizing Northern Democrats.<sup>117</sup>

Douglas framed a response — it became known to history as his "Freeport Doctrine," although he had uttered it repeatedly over the preceding several years — by which he hoped to avert the dilemma. The Supreme Court's ruling against congressional and territorial legislation directly excluding slavery, Douglas said, was certainly the law of the land and had to be respected. However, that ruling had not stripped territorial lawmakers of the means, should such be their choice, to keep slave-holding out of their territories. The means they still retained, Douglas said, was that of refusing to enact certain sorts of supportive legal regulations that, experience showed, slaveholders needed in order to make slavery a practically workable institution.<sup>118</sup> Examples might be laws defining offenses of theft, trespass, and fraud in regard to dealings in slave property; or laws criminalizing disobedience of masters by slaves, or exempting masters from ordinary tort liability in regard to the treatment of slaves; or laws making it criminal to teach a slave to read or providing for police intervention against assemblies of slaves otherwise than under master's orders; or even laws prohibiting masters and others from abusing slaves in ways believed likely to induce rebelliousness. A full package of such laws would be what the politics of the time called a slave code, and of course slave codes were in force in all of the slave states.

Lincoln was not cowed by Douglas's response. His rejoinder to it may have a remarkable ring to the ears of contemporary American constitutional lawyers. Here is some of what Lincoln said:

. . . I will ask you, my friends, if you were elected members of [a territorial] Legislature, what would be the first thing you would have to do before entering upon your duties? Swear to support the Consti-

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116. See, e.g., 2 COLLECTED WORKS, *supra* note 108, at 464 (Speech at Springfield, Ill., June 16, 1858).

117. HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 352 (1982).

118. See 3 COLLECTED WORKS, *supra* note 108, at 51-52 (Douglas's reply to Lincoln at Freeport).

tution of the United States. Suppose you believe, as Judge Douglas does, that the Constitution of the United States guaranties to your neighbor the right to hold slaves in that Territory — that they are his property — how can you clear your oaths unless you give him such legislation as is necessary to enable him to enjoy that property? What do you understand by supporting the Constitution . . .? Is it not to give such Constitutional helps to the rights established by that Constitution as may be practically needed? . . . Do you support the Constitution if, knowing or believing there is a right established under it which needs specific legislation, you withhold that legislation? Do you not violate and disregard your oath? I can conceive of nothing plainer in the world. . . .

. . . Let me ask you why many of us who are opposed to slavery upon principle, give our acquiescence to a Fugitive Slave law? Why do we hold ourselves under obligations to pass such a law, and abide by it when it is passed? Because the Constitution makes provision that the owners of slaves shall have the right to reclaim them. . . .

. . . . [A]lthough it is distasteful to me, I have sworn to support the Constitution, and having so sworn, I cannot conceive that I do support it if I withhold from that right [to have fugitive slaves “delivered up”] any necessary legislation to make it practical. And if that is true in regard to a Fugitive Slave law, is the right to have fugitive slaves reclaimed any better fixed in the Constitution than the right to hold slaves in the Territories? . . . [I]f I acknowledge, with Judge Douglas, that this [*Dred Scott*] decision properly construes the Constitution, I cannot conceive that I would be less than a perjured man if I should refuse in Congress to give such protection to that property as in its nature it needed.<sup>119</sup>

In sum and in effect, Lincoln argued that if slaveholding really is a constitutionally super-valued interest under our Constitution, as the Supreme Court apparently had declared in *Dred Scott*, then Congress stood under plain constitutional obligation to enact a slave code for the territories.

Lincoln’s response to Douglas thus stands as an uncanny, disturbing, ironic anticipation of the freedom-friendly state thesis. As you will recall, the thesis (my words, now) is that “the Bill of Rights imposes active obligations on the state, or government, to make sure that its deployments of its special powers — including powers to decide from time to time what the law is — are duly attuned to the aim of protecting persons effectively against privately wrought infringements of their constitutionally super-valued interests.” That is what Lincoln said by way

119. 3 COLLECTED WORKS, *supra* note 108, at 130-32 (Speech at Jonesboro, Ill., Sept. 15, 1858).

of retort to Douglas. I suppose it is obvious why we who sympathize with Fiss might find this anticipation of Fiss by Lincoln disturbing, but I am about to expand upon the point, in case it is not.

#### D. *Contingency in the Common Law?*

What the example of Lincoln's retort to Douglas shows is that opening the doors wide to bill of rights review of the common law is not *necessarily* a gain for freedom or human rights. It depends on how well the common law of the moment, and the leanings of the common-law judiciary, stack up against your ideas of true human-rights ideals, as compared with how well the Bill of Rights and the constitutional judiciary stack up. The point appears most clearly if we assume (as Lincoln himself maintained was the case<sup>120</sup>) that the 1850s American common-law default position, in the absence of relevant positive legislation on the point, was anti-slavery or "free soil." On that understanding, a human being could not lawfully be held as property in any given jurisdiction, unless and until the common law in that jurisdiction had been altered from its default or "natural" state, either by legislation or by the in-the-trenches work of the common-law judiciary. Assuming for the sake of the argument that the Supreme Court in *Dred Scott* correctly had read the American constitutional Bill of Rights to be positive legislation setting up the interest in slave-holding as constitutionally super-valued,<sup>121</sup> Lincoln's application of the freedom-friendly state thesis would, in this instance, have obligated both territorial legislators and common-law judges to work at supplanting the default free-soil doctrine of the common law with the rudiments, at least, of a slave code.<sup>122</sup> In this particular historical context, application of the freedom-friendly state thesis to bring common-law doctrine under review for compatibility with the Bill of Rights would have been fraught with baleful consequences for human rights, because, from a human rights standpoint, the common law was fine and the Bill of Rights was deadly.

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120. See 2 COLLECTED WORKS, *supra* note 108, at 262-63 (Speech at Peoria, Ill., Oct. 16, 1854).

121. See note 111 *supra* and accompanying text.

122. The only apparent reason why application of the thesis would not have had exactly the same effect within the free-soil states of the Union was that the first eight amendments were not at that time considered to have any bearing on the laws of the states. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Even so, Lincoln purported to believe that the Supreme Court soon might rule that its slavery-protective doctrine was binding within the boundaries of the states. See, e.g., 2 COLLECTED WORKS, *supra* note 108, at 466-67 (Speech at Springfield, Ill., June 16, 1858). A part of Lincoln's reason for this apprehension may have been the privileges and immunities clause, U.S. CONST. art IV, § 2. See, e.g., *Lemmon v. People*, 20 N.Y. 562 (1860), where the New York court rejected a plausible-looking claim to the effect that New York could not, consistently with this clause, strip a slave-owner of his slave property by applying its law of personal freedom to slaves being shipped through the port of New York from one slave jurisdiction to another.

Has the bothersome twist passed away with the subsequent, radical correction to our Bill of Rights?<sup>123</sup> Have our Constitution and its oracles become so perfect? Yes, I am sure we all believe that the cause of human rights was served well by denying L.B. Sullivan his shot at a pound of the flesh of the New York Times Company. I wonder whether we all are equally sure that Larry Flynt's human-rights claim was stronger than Jerry Falwell's in the notorious case of the Campari parody.<sup>124</sup> Anyone who worries that Falwell did have a major human right at stake may also be inclined to congratulate Virginia for its common law vindicating that human right. Such a person even may be inclined to doubt that the human-rights cause reaped a net gain when the Supreme Court, in *Hustler Magazine v. Falwell*,<sup>125</sup> made Virginia's common law take a back seat to Flynt's constitutionally super-valued interest in freedom of expression — or, if you prefer, to the set of public interests that the super-valuation of Flynt's interest is very reasonably believed to serve.<sup>126</sup>

Another, timely and topical example is staring us in the face. Were it only the good, old common law of property and contract with which we had to deal, private universities today undoubtedly would have rights, powers, and privileges to use race in any way they please — or at any rate in any way geared to a policy of inclusion as opposed to exclusion<sup>127</sup> — as a criterion for admissions decisions. As it happens, though, there is a federal statute in force — Title VI of the Civil Rights Act of 1964<sup>128</sup> — that can, but need not necessarily, be read to have the effect, for just about every private university in the country (excepting only those willing to forgo all access to federal funds), of subordinating the common-law freedom of private universities to classify by race to strictures paralleling those that the fourteenth amendment imposes on the use of racial classifications by states. In *Bakke*,<sup>129</sup> a Supreme Court majority acted on the premise that such, indeed, is the command of Title VI, and the aftermath has been no bed of roses for Brennan liberals, Justice Brennan's own agreement with the premise notwithstanding.<sup>130</sup> The

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123. See U.S. CONST amends. 13, 14, 15.

124. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The parody of a Campari ad published by Flynt's magazine graphically imagined Falwell having sex with his mother in an outhouse.

125. *Id.*

126. See *supra* text preceding notes 50-54 and text accompanying.

127. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2444 (2003) (Ginsburg, J., dissenting); cf. Singer, *supra* note 93.

128. 42 U.S.C. § 2000d et seq.

129. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

130. See *id.* at 324, 328 (Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part).

maverick judgment of Powell, J., saved our bacon then;<sup>131</sup> but afterward, owing to intervening changes in the Supreme Court's personnel and that of lower federal courts, we entered a period of dread that the axe might fall — as in fact it did in some parts of the country<sup>132</sup> — in the form of judicial rulings flatly prohibiting any conscious consideration of race in university admissions, in the name of the equal protection clause, made applicable to private institutions by Title VI. *Grutter*<sup>133</sup> has let us off the hook, but *Grutter*, we all feel, was a close shave. Constitutionally dictated reform of the common law is a pig in a poke, it seems — nothing for Brennan liberals to welcome wholesale.

We could multiply examples. As a matter of the common law of property and contract, private universities today undoubtedly have powers and privileges to impose restrictions on what they deem to be excessively uncivil, abusive, or harassing campus speech. Subject the common law conferring those powers and privileges to bill-of-rights evaluation, and the outcomes become much more clouded.<sup>134</sup> Is everyone so sure — would Owen Fiss be sure — that human rights would be the gainer?<sup>135</sup>

In a famous decision of the 1960s, the Supreme Court of New Jersey concluded that New Jersey's common law of trespass encompasses a privilege of entry for a lawyer whose job is to provide legal services for farm workers and who needs to enter a farm in order to consult with a client.<sup>136</sup> The court had been invited to rule in the defendant's favor on the basis that application of the common law of trespass to convict him in these circumstances would have violated his rights under the First Amendment. The court politely begged off from this suggestion to bring New Jersey's common law under federal Bill of

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131. See *id.* at 269 (opinion of Powell, J.)

132. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

133. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

134. The state law upheld in *Virginia v. Black*, 538 U.S. 343 (2003), caught only utterances that are found to have been specifically intended to convey a threat of physical harm. Arguably, the same or an allied principle would allow a university to penalize utterances found to have been specifically intended to produce severe emotional distress and thereby to obstruct, hinder or deter a person from free and full participation in campus activities, even if not to convey a threat of physical harm. The matter, however, is hardly free from doubt.

135. See, e.g., Fiss, *Many Faces*, *supra* note 47, at 5-6 (recapitulating sympathetically the "silencing" argument in defense of the constitutional permissibility of hate-speech regulation); Owen Fiss, *The Right Kind of Neutrality*, in FISS, *LIBERALISM DIVIDED*, *supra* note 50, at 111 (same).

136. See *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971). The defendants were charged under a statute providing that "[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than \$50." 277 A.2d at 370. The statute contained no special definition of trespass, and the Court's opinion plainly deals with trespass as a common law doctrine.

Rights scrutiny.<sup>137</sup> If you want to speculate about why, ask yourself how certain you are that New Jersey's common law rule *with* the privilege could have withstood attack as a violation of the farm owner's Fourteenth Amendment right not to be deprived of property without due process of law.<sup>138</sup>

Full-blast exposure of the common law to bill of rights scrutiny, I am suggesting, could prove to be a mixed bag from the standpoint of any given observer's conception of human rights and human freedom, and that would hold for "liberal" as well as for "conservative" observers. The point is structural and endemic. In the elegant terms offered by Professor Van der Walt, the possibility that cannot ever be erased is that

horizontal application of fundamental rights, historically the most recent and systematically the final way in which the law can be revised in terms of the public interest . . . itself become[s] privatised by privatising interpretations of what a fundamental right means under specific circumstances.<sup>139</sup>

We have no reason, adds Van der Walt, to assume that "the subordination of economic to political power at which the horizontal application of fundamental rights aims, can be achieved."<sup>140</sup>

Viewing the scene from a slightly different angle, one easily might bring it under coverage of a thesis advanced by Mark Tushnet in his book *Taking the Constitution Away From the Courts*.<sup>141</sup> "On balance," Tushnet concludes in that book, "judicial review [of statutes] may have some effect in offsetting legislators' inattention to constitutional values" and "the effect is not obviously good."<sup>142</sup> Allow me to unpack that. Insofar as Americans rely on judicial review to give effect to constitutional values, constitutional values are, to all practical intents and pur-

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137. See 177 A.2d at 371-72.

138. You might have been certain it could after the Supreme Court's decision in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), but the Court's 1972 decision in *Lloyd Corp. v. Tanner*, 407 U.S. 551, would not have left you confident at all. In *Lloyd Corp.*, the Supreme Court rejected a claim that the respondents had a constitutionally protected right to leaflet at the petitioner's shopping center, using language suggesting that state common law upholding the respondents' side of the controversy might have been in constitutional difficulty. "The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case," the Court wrote. "They provide that 'no person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.' . . . We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected." *Id.* at 567, 570.

139. Van der Walt, *FUTURITY*, *supra* note 72, at 102. In the South African debates, "horizontal application" means application of bill-of-rights norms to cases involving only private parties and common law.

140. *Id.* at 110.

141. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

142. *Id.* at 153.

poses, exactly those values that Supreme Court majorities from time to time advance in the name of the Bill of Rights. Hence, the expenditure limits struck down in *Buckley*,<sup>143</sup> the minority preferences struck down in *Croson*<sup>144</sup> and *Adarand*,<sup>145</sup> the bakers' hours law struck down in *Lochner*,<sup>146</sup> all did indeed reflect contempt by their authors of constitutional values. And yet the effect of having all these contemptuous laws struck down "is not obviously good," I daresay, in the eyes of everyone reading this.

Thus Tushnet's lesson: When we expose legislation to judicial constitutional review, we take our chances on the superiority or preferability, in our eyes, of constitutional values as rendered by the reviewing court to the values that actuate the legislature. There is no self-evident reason to suppose, or to hope, that the same does not hold if we substitute "expose common law doctrine" for "expose legislation" and "the values that actuate common law decisionmaking" for "the values that actuate the legislature." Or is there?

#### IV. THE DIGNITY OF THE COMMON LAW?

##### A. *The Question Posed*

Part III identifies a purely pragmatic reason why Brennan liberals, in the United States today, might feel some caution about the idea of throwing all of the common law wide open to judicial constitutional review. Being pragmatic, the reason also is situational and contingent. It counsels you to choose based on your level of confidence in the Supreme Court's propensity to enforce, in the name of our country's constitutional Bill of Rights, a set of values that you will find preferable to some other set that you think more typically will drive the work of common law courts in the states. If you don't especially trust the Supreme Court in that regard — as a Mark Tushnet, perhaps, would not — then maybe you won't be an enthusiast for judicial constitutional review of the common law. But then ought you not — like Tushnet — be feeling similar doubts about judicial constitutional review of statutes?

Suppose we observed some fraction of a country's legal intelligentsia evincing a level of uneasiness about exposing statutes to judicial review. A general mistrust on their part of the likely "tilt," let us call it, of the work of the constitutional judiciary might possibly (it certainly would not necessarily) be lying behind their qualms. Notice that the mistrust could be directed to any or all of (1) the constitutional judges

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143. *Buckley v. Valeo*, 424 U.S. 1 (1976).

144. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

145. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

146. *Lochner v. New York*, 198 U.S. 45 (1905).

themselves (their supposed or perceived ideological leanings); (2) the perceived normative content of the specific constitutional instrument that will serve as their special charter; and (3) the judgmental procedures ("interest-balancing" for example) that judges are expected to use in applying constitutional content to cases.<sup>147</sup> And what if we observed, among this same skeptical fraction, a comparable unease about exposing *the common law* to the corrective gaze of a constitutional judiciary? Any or all of the mentioned kinds of mistrust could explain that attitude, too. But here is one thing that it may seem none of these kinds of mistrust, alone or together, could suffice to explain: a *distinct* unease about subjecting the common law to correction by judges acting in the Constitution's name. Now, this is exactly what we do observe, in some quarters, both in the United States<sup>148</sup> and in South Africa.

### B. South African Views

Had the Alabama legislature, by statute, enacted exactly the defamation rule invoked by L. B. Sullivan against the *New York Times*, there could have been no doubt that a court must scrutinize that rule for constitutional acceptability before using it to impose any sort of burdensome consequence on a speaker, for speaking. Could the conclusion conceivably be different just because the same state rule of law is judge-made rather than legislatively enacted? The Warren Court easily answered no,<sup>149</sup> but a glance at the South African scene suggests that the matter may be less simple than they let on.

As we dig into this question, it will be well to bear in mind that — as frequently has been noted — human-rights claims often if not typically are in play on both sides of a common-law case.<sup>150</sup> We have to acknowledge this, even if some of the human-rights claims sometimes in contention may be ones that you or I or whoever might not rank especially high — maybe Jerry Falwell's dignitary claim, or maybe Larry Flynt's claim to freedom to spew forth whatever enters his head, or maybe some landowner's claim to exclusive control over his property, lawfully acquired. There are bound to be cases in which you will concede that the claims on both sides are weighty: *Carmichele*, perhaps, where the inevitable (and intended!) consequence of imposing the pres-

147. Compare the views of Derek Van der Merwe discussed *infra* text accompanying notes 169-82.

148. See Part IA.

149. See text accompanying note 8, *supra*.

150. See, e.g., Ellmann, *supra* note 44, at 50-54; Sprigman & Osborne, *supra* note 27, at 42; Van der Walt, *FUTURITY*, *supra* note 72, at 111 ("The horizontal application of the constitution confronts us without exception with a conflict between two fundamental rights or two interpretations of what a particular fundamental right means under specific circumstances.").



sure of liability-risk on prosecutors and police will be a higher rate of bail refusals and pre-trial detentions of — as it sometimes must happen — innocent accuseds. Of course, in no class of cases is the collision of human rights more evident than in defamation cases.

Keeping this point about conflicting human-right claims in mind, the question is whether one possibly could believe that common law decision-making by judges should systematically be regarded with less suspicion than statutory rule-making by legislatures; suspicion, I mean, of “inattention,” as Professor Tushnet calls it, to some set of values — maybe “constitutional values” — that you or I might wish would be normatively commanding for whoever is in charge.<sup>151</sup> The question, for example, is whether a common law defamation rule might strike us as *prima facie* less open to suspicion of the inattention offense than would the exact same rule if enacted by a legislature. Motive, after all — or process, or good faith — may sometimes save the legitimacy of an act we regard as mistaken on the merits but only, as it were, by bad luck.<sup>152</sup> Might one, perhaps, see the two processes — parliamentary and adjudicative — as characteristically driven by different sets of motivations? For example, one might see the mixes of “reason” and “will” in the two forums as being markedly different.<sup>153</sup> One might think of parliaments as likelier than courts to be sites of unrestrained, partisan power struggles, or of exhibitionist posturing.<sup>154</sup> One might think of the common law as an accumulative product of sincere applications of reason by generations of judges — an “interpretive community,” we might call them<sup>155</sup> — specially trained to the task, and specially imbued with the values of a tradition in which the right human rights ideals — or call them “our public values”<sup>156</sup> — are constantly and aptly influential.

One would then, to be sure, be taking quite a rosy view of common law adjudication. Bear with it, though; even take it one step further. Is it beyond imagining that you would sometimes think of the animating human rights ideals of your country’s constitutional bill of rights as being essentially continuous with a human rights tradition ensconced in your country’s historical, common law corpus juris? These ideals would

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151. Compare text accompanying note 142 *supra*.

152. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 747-49 (1982).

153. See Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989).

154. But see John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons From Europe*, TEX. L. REV. (forthcoming 2004) (suggesting that appointment of U.S. federal judges for life, by majoritarian — as opposed to supermajoritarian — procedures, may help tempt some judges to “speak to external audiences in their own names” rather than keep their public judicial identities merged with those of their courts, or of the judiciary, collectively).

155. See Fiss, *supra* note 152, at 745.

156. See Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

belong to the set, again so to call it (it's not a phrase I choose by accident), of your country's public values.<sup>157</sup> Thus perceiving the set to encompass both constitutional and common law values, principles, or ideals, you might sometimes think of testing the constitutionality of a questioned statutory solution to a rights controversy by looking to see how the statute's specific dictates and implicit principles compare with those of the extant and historic common-law solutions — as, in fact, the Constitutional Court of South Africa has done from time to time.<sup>158</sup> None of this would mean you were willing to exempt common law solutions categorically from bill of rights inspection, but it does suggest how you might feel some degree of caution about inviting the constitutional judiciary to go mucking around too freely with the common law.

In South Africa, where constitutional drafters and judges have thrown over the traces when it comes to exempting common law solutions categorically from bill-of-rights inspection,<sup>159</sup> the stance of caution I have just mentioned is not infrequently visible — in academic commentaries, in the work of the common-law judiciary inspecting doctrine with respect to the “spirit, purport, and objects of the Bill of Rights,” and in the conduct and posture of the Constitutional Court.<sup>160</sup> Start with the academics. Some brood over what they call constitutional “invasions” of the common law.<sup>161</sup> Johan Van der Walt, a decidedly transformation-minded scholar, finds himself in some sympathy with judges and legal academics whose “professional identities,” he says — presumably out of direct, personal knowledge — have been shaped by “common-law traditions and institutions,” and who, in consequence, experience constitutional reinspection of the common law as “a threat to the integrity of existing legal principles and institutions.”<sup>162</sup> Professor Van der Walt is not uncritical of this defensive tendency, but neither is he clear of it. He is not keen about the prospect of the common-law's undergoing formal correction under the constitutional lash.<sup>163</sup> He shrinks from seeing the

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157. Compare *Jordan v. State*, 2002 (11) BCLR 1117 (CC) ¶¶ 102-04 (opinion of O'Regan and Sachs JJ), where two justices dealt with a party's proposition that the Constitution bars the state from criminalizing anyone's exercise of liberty (in this case, to maintain a brothel) for the sake of a “particular” or “private” moral code. The justices asserted that the Constitution does not debar the state from enforcing “civic” morality. “Indeed,” the justices wrote, “the Bill of Rights is nothing if not a document founded on deep civic morality. . . .” *Id.* ¶ 104.

158. See *infra* text accompanying notes 204-15.

159. See Part IB.

160. See, e.g., Jeremy Sarkin, *The Common Law in South Africa: Pro-Apartheid or Pro-Democracy*, 23 HASTINGS INT'L & COMP. L. REV. 1, 21 (1999) (speaking of the Constitutional Court's “reluctance to drastically transform the common law”).

161. See P.J. Visser, *A Successful Constitutional Invasion of Private Law*, 58 J. FOR CONTEMPORARY ROMAN-DUTCH LAW 745 (1995).

162. Van der Walt, *Co-operative Relation*, *supra* note 12, at 359.

163. See *id.* at 355.

common law "indicted" from the outside, by a constitution or a constitutional ministry that would claim to offer protection for rights that (they may too hastily suppose) are not already protected by the common law; or at any rate are not already protectible by methods indigenous to the common law, applied to normative resources contained within it.<sup>164</sup> He senses that such an antagonistic way of framing the transaction between the constitution and the common law poses a danger not just to the integrity but to the dignity and the standing of the law *in general* and its image in South Africa.

But Professor Van der Walt is ambivalent. He is ideologically left, reformist, "progressive."<sup>165</sup> He affirms a possible, if not logically certain, need — regrettable as it may be — for some measure of conscious "constitutional intervention into common-law jurisprudence."<sup>166</sup> Perhaps the need could be averted, Van der Walt suggests, if the common law judiciary could come to see constitutional law as a collaborator, not an adversary; if common law theorists could stop regarding the domains of law and of constitutional politics as mutually sealed off by a vacuum boundary that a judge could not heed without "insulat[ing] aspects of law or social life" from normatively worthy "constitutional imperatives."<sup>167</sup> In Van der Walt's preferred vision, constitutional law and common law are two moments in a single process of conversation and "creative tension."<sup>168</sup> Their relation, in the end, becomes "co-operative."

Ambivalence in a different key appears in the work of Van der Walt's colleague and distinguished private-law scholar, Derek Van der Merwe. Like Van der Walt, Van der Merwe worries that "constitutional colonisation" of the common law (as he not too cheerily dubs the process) poses a danger to institutional integrity.<sup>169</sup> But whereas Professor Van der Walt voices concern about the effects of constitutional vs. common law trench warfare on the integrity and standing of the institution of law as a whole — or I suppose we might call it legality or the rule of

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164. *Id.* Van der Walt is not suggesting that the Constitution's Bill of Rights is deviant in substance from what it ought ideally to be. He is suggesting that neither (in general tendency) is the common law. For example, "a thorough application of the substantive principles of the common law of delict could have achieved everything the constitution could have required it to achieve in the case of *Carmichele*," because "after all, the rights to dignity, life, and freedom and security of the person have all along been part and parcel of the South African common law." Van der Walt, *Threshold*, *supra* note 12, at 519, 524.

165. *See, e.g., id.* at 521 n.8.

166. *Van der Walt, Co-operative Relation*, *supra* note 12, at 362.

167. *Id.* at 355; Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 *BUFF. L. REV.* 383 (1979) (on "live" and "vacuum" boundaries").

168. *Id.*

169. *See* Derek Van der Merwe, *Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity*, TSAR 2000-2, at 12.

law — Dean Van der Merwe is concerned in a more pointed way about the possible triumph of constitutional law *over* common law.<sup>170</sup> More precisely, he is concerned about occupation of the entire field of legal-normative decision-making by a discursive modality (or “style of argument”<sup>171</sup>) that he sees as distinctive to constitutional law, displacing one that he sees both as native to common law and, I think it fair to add, as more abstruse and tenderer than the frankly instrumentalist style of constitutional debate. Van der Merwe is afraid that common-law argument will end up as constitutional argument — meaning “policy” argument — “in drag.”<sup>172</sup>

Legal-doctrinal argument is one thing, Van der Merwe maintains, while policy or political debate (of which constitutional argument is a subset) is another. The former proceeds against a conventional, pre-established background set of ideas and categories, a distinctively legal grammar that injects into the facts and events that compose a legal case their distinctly legal significance, thus shielding legal decision off from raw, consequentialist calculation. Doctrinal argument is a method, then, by which practitioners work out the *legally* best or aptest shadings and orderings of shared, permanent principles in changing contexts, where “legally” connotes a time-tested, evolving, civilizational wisdom that no sheerly instrumentalist or “balancing” calculus ever could capture.<sup>173</sup> By contrast, political, including constitutional argument involves the parties in an open, unmediated contest of clashing interests and rights-claims that only a trade-off could resolve.<sup>174</sup>

Van der Merwe is not anti-political, anti-constitutional, or anti-consequentialist. Both the legal and the political component have their place, he maintains, in an entire, good institutional order. South Africa’s Bill of Rights is not wrong or inept; it is fine, welcome, and overdue. Only, it is not *law*. Granting that the *values* animating constitutional law (so-called) may be consonant with those of the law proper, the *grammar* of constitutional-legal argument is incorrigibly that of politics, not law.<sup>175</sup> The point is, the country needs both the frank consequentialism for which the Constitution speaks and the cunning-of-reason of the common law. Both should be preserved, and the way to preserve both is to keep their respective, institutional domains vacuum-bounded from each other — exactly what Van der Walt preaches against.<sup>176</sup> If the political

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170. *See id.* at 14, 29, 31.

171. *Id.* at 20.

172. *Id.* at 21.

173. *Id.* at 22-25.

174. *See id.* at 14.

175. *See id.* at 26.

176. Van der Merwe criticizes Van der Walt expressly on this account. *See id.* at 27.

and policy concerns of constitutional debate are allowed to poach in the delicate common-law environment, they will overcome and destroy it, to the country's great loss. Failure to achieve in institutional practice "the distinct but complementary natures of common law argument and constitutional argument" will end, deplorably, by "collaps[ing] law into politics" or "policy."<sup>177</sup> (Van der Merwe expresses no worry that the collapse might occur in the opposite direction, but some other South African lawyers and jurists do.<sup>178</sup>)

The disagreement between Van der Walt and Van der Merwe suggests that something of moment may, after all, hinge on the choice between "direct" and "indirect" application of the Bill of Rights to private disputes for which the rules of decision are supplied by the common law.<sup>179</sup> Van der Merwe's argument objects specifically (in effect) to *indirect* application. Indirect application means subjection of common law doctrine to revision under the Constitution's gaze, and that is an operation that cannot — Van der Merwe maintains — be carried out without corrupting the common law developmental process with an alien form of discourse and reasoning. *Direct* application, by contrast, should raise no such concern. In Van der Merwe's view (which, remember, commends the Constitution on the merits), there should be no problem, for example, in a court's interdicting<sup>180</sup> a person from proceeding with an activity — including the pleading of a claim or defense in a lawsuit — that the court finds would break the Constitution by inflicting an unjustified incursion on a constitutionally protected interest of another. Yes, the defendant's interdicted activity may appear to be legally privileged — or the claim or defense he pleads may appear to be authorized — by extant common law doctrine, so interdicting him cannot be harmonious with that doctrine, instrumentally speaking. But if done strictly on the ground that the Constitution amounts to direct, positive, paramount legislation against what the defendant is doing, the interdict leaves the common law where it was, unmolested and free to respond to the situation in whatever way common law discourse and reasoning may recommend.

In that sense, at least — and it's a sense that matters much to Van

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177. *Id.* at 29, 31.

178. *See, e.g.,* Serjeant-at-the-Bar, *infra* note 195. *See also* <http://www.bday.co.za/bday/content/direct/1,3523,1402443-6079-0,00.html> (last visited Oct. 27, 2003), reporting a law professor's objection to the use of lawyers as part-time, acting judges in the labor courts, because the part-timers "at times seem to compete with the high court as a common law bench. They appear to ignore the protective elements of the new SA labor laws, which are central to the new dispensation."

179. *See* Part IB.

180. I use the South African term for an injunction.

der Merwe — direct application leaves the common law with its integrity and identity unscathed, whereas indirect application invades them.<sup>181</sup> It seems that Van der Walt's view would be quite different. He is in favor of express, free-flowing, both-ways exchange between constitutional and common law argumentation, preferring that the laboring oar should be taken by the common law side whenever the two come into apparent contact. As we'll soon see, there is a match between that preference and certain institutional aspects of the Constitutional Court's management of the indirect-application process.<sup>182</sup>

Ambivalence regarding constitutionally driven reform of the common law has not been confined to the scholar's den; it has affected the working judiciary, too. At the level of the High Courts, there were early signs of resistance (not universally shared) to the idea that the common law might stand normatively in need of correction under constraint of the Bill of Rights.<sup>183</sup> For example, in an early case raising the question of whether the free-expression guarantee in the Bill of Rights might possibly be violated by a plaintiff's invocation of the common law of defamation against a public-figure defendant (where the law allowed no defense of absence of malice), a judge expressed his qualms regarding what he called a looming "constitutional invasion" of the common law. He could not, the judge wrote,

imagine that the drafters of the Constitution intended the whole body of our private law to become unsettled. Are we to see the invasion of private property justified by the trespasser on the strength of the right to freedom of movement (section 18<sup>184</sup>) or the right to freely choose a place of residence anywhere in the national territory (section

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181. On my reading of it, Van der Merwe's view is exactly contrary to the view of some South African private lawyers that H.A. Strydom reported (but did not endorse) in *The private domain and the bill of rights*, [1995] 10 SAPR/PL 52. What concerned the private lawyers, Strydom wrote, was that "a direct [as opposed to an indirect] application may endanger the self-reliant and distinctive quality of private law by letting it be overawed by public law concerns associated with the constitutional rights." *Id.* At 60. Strydom went on immediately to deny that such a result would be "an inevitability. . . . The fact that a private law issue has been taken up in a document such as a constitution does not transform the private law issue into a public law one," *id.* — a view that accords with Van der Merwe's as I understand it.

182. See *infra* note 203 and text accompanying.

183. For examples of more positively receptive, early responses from High Court judges, see *Holomisa v. Argus Newspapers Ltd*, 1996 (6) BCLR 836 (W) (Cameron, J.) (considering the bearing on the common law of defamation of constitutional guarantees respecting dignity and freedom of expression); *Gardener v. Whitaker*, 1994 (5) BCLR 19 (E), 1994 SACLR LEXIS 284 (Froneman, J.) (same), *application for leave to appeal dismissed*, 1996 (6) BCLR 775 (CC); *Ryland v. Edros*, 1997 (1) BCLR 77 (Farlam, J.) (described *infra* text accompanying notes 199-200).

184. See SA CONST., 1993, § 18 (guaranteeing everyone a right of freedom of movement throughout the country).

19<sup>185</sup>)? Surely this was not intended. There was no need for constitutional invasion of the private law. Parliament is empowered to alter the existing law wherever the shoe pinches.<sup>186</sup>

In another early judgment, written in Afrikaans, an English-language summary included in the report records the judge relying on the "established principle" that "the legislature [does] not intend to amend the common law more than [is] absolutely necessary, and that legislative amendments of the common law must be expressed in the clearest possible terms."<sup>187</sup> (The Constitution, remember, is a statute.<sup>188</sup>) Courts ought to construe the new Constitution — specifically, with regard to the question of horizontal application of its Bill of Rights — according to the established, statutory-interpretative principle of looking for the mischief to be remedied. In this case, that mischief is not the common law but rather is "the previous constitutional system."<sup>189</sup> Moreover, this truth has not

been sufficiently recognised in those judgments which [have] held fundamental rights provisions to apply horizontally. It [has] been observed that a great deal of South African law was uncontaminated by the oppressive and discriminatory policy of the previous regime. The common law contain[s] adequate remedies and [is] a comprehensive system of well defined and equitably limited rights and obligations including in essence those rights entrenched in Chapter 3 of the Constitution. The Constitution [does] not demand a radical break with all the legal traditions of the past. Sweeping changes to the law ought not to be made lightly.<sup>190</sup>

Accordingly, the judge could see no basis for a conclusion that "the framers of the Constitution . . . intended that the spirit, purport and objects of [the Bill of Rights are] to extend the fundamental rights beyond those circumstances for which the common law made provision."<sup>191</sup>

As we have seen, such early, resistant judgments have been overtaken by clear endorsement, both by the "final" constitutional framers and the Constitutional Court, of a standing judicial duty of reinspection of the common law having due regard to Bill of Rights norms.<sup>192</sup> The promptings behind the early hesitation have not entirely disappeared

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185. *See id.* § 19.

186. *De Klerk v. Du Plessis*, 1994 (6) BCLR 124 (T), 1994 SACLR LEXIS 244, at \*26.

187. *Potgieter en 'n Ander v Kilian*, 1995 (11) BCLR 1498 (N); 1995 SACLR LEXIS 272, at \*6.

188. *See supra* note 23.

189. *Potgieter*, 1995 SACLR LEXIS 272, at \*7.

190. *Id.*

191. *Id.*

192. *See Part IB.*

from view, however; they continue to influence not only academic opinion (as we have seen) but judicial work.

At the level of the SCA, we observe not just Old Guard judges but more recent appointees of the ANC government speaking respectfully of "freedom of contract" and its relation to human dignity.<sup>193</sup> We observe them, therefore, refusing to cast any general cloud of doubt over common-law contract rules, including some that certain American judges of recent times might have found in need of modification in order truly to honor a constitutional guarantee not only of everyone's "equality before the law" but also everyone's enjoyment of the "equal benefit of the law."<sup>194</sup> According to an account offered by an approving commentator, the judges of the SCA have recognized that "rules of contract, delict [i.e., tort], and succession, developed over centuries[,] hold much value." In the commentator's view, the body of common law rules represents not only "a collective wisdom built over centuries" that the Constitution aims to "redeem," but "a set of rational concepts, the content of which may alter as values change incrementally over time."<sup>195</sup>

But why speak of "redeeming" the common law's wisdom and rationality? Because, the commentator says, South Africa's common law underwent a period of pollution by apartheid and racist rule, and it contains, in consequence, some matter that is incompatible with basic commitments of the new Constitution.<sup>196</sup> Such an observation would match up well with other recent cases in which common-law judges rather dramatically have overturned racist or otherwise perceivedly discriminatory precedent, sometimes avowedly in response to constitutional pressure and sometimes not. In one such case, the SCA, explicitly

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193. See *Brisley v. Drotzky*, 2002 (12) BCLR 1229 (SCA). The *Brisley* case involved an attack on the common law doctrine giving effect to clauses in written contracts that prohibit any subsequent variation of the parties' obligations except by an instrument in writing. Cameron, JA, concurring in a unanimous judgment upholding the doctrine, remarked that "the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons . . . is that contractual autonomy is part of freedom. Shorn of its obscene excesses [citing *Lochner v. New York*, 198 U.S. 45 (1905)], contractual autonomy informs also the constitutional value of dignity." *Id.* ¶ 94.

194. SA CONST. § 9(1).

195. See Serjeant at the Bar, "Common law should not be discarded," *Mail & Guardian online*, Tuesday, Mar. 9, 2004, <http://www.mg.za/Content/13.asp?ao=32338> (last visited Mar. 9, 2004). A (presumably different) commentator writing under the same alias eight months previously had a decidedly different view. See Serjeant at the Bar, "A transformed judiciary needs transformed minds," *Mail & Guardian online*, 17 April 2003, <http://www.mg.co.za/Content/13.asp?o=18889&sa=19> (last visited July 7, 2003), citing both the *Brisley* and *Afrox* cases as evidence of "a continued affection for a common law that remains incongruent with the spirit of the Constitution," a lapse that *that* "Serjeant" blames on the state's failure adequately to address "the problem of a judiciary that reflects the nation's demography."

196. "Common law should not be discarded," *supra* note 195.



adverting to a constitutional anti-discrimination clause that includes sexual orientation among the “suspect” axes of classification,<sup>197</sup> extended the common law tort action for loss of support to include claims by same-sex partners in long-term, committed relationships.<sup>198</sup> Another notable set of cases has involved financial claims of wives against husbands or ex-husbands, arising under customary-form Islamic marriages. The old precedents denied enforcement of such claims on the theory that Islamic marriages are contractual in nature but, being by custom “potentially” polygamous, are *contra bonos mores* and therefore give rise to no judicially cognizable entitlement.<sup>199</sup> Those precedents have been sent packing, although the most authoritative decision discarding them could itself be read as evincing a trace of resistance to the idea that the common law and its processes may sometimes stand in need of radical correction under the dictate of an undisguisedly political intervention (such being what the new South African Bill of Rights undoubtedly is, however universalist in inspiration, or otherwise admirable, we also may consider its content to be). The leading decision from the SCA makes a major point of insisting that the doctrinal revision it pronounces has occurred strictly within the confines of common-law jurisprudence.<sup>200</sup> The court, it seems, wished to avoid having the common law be seen in public as undergoing chastisement from an outside, paramount force. Apparently, it preferred — just as Professor Van der Walt prefers<sup>201</sup> — the image of the common law redemptive, the common law cleaning up its own act as the common law is capable of doing.

And what of the Constitutional Court? The CC, although evidently possessed of jurisdiction to impose its own, detailed views of exactly how common law doctrine ought optimally to be attuned to the “spirit, purport, and objects” of the Bill of Rights,<sup>202</sup> has opted, thus far, to channel that work to the country’s common-law judiciary, subject to its own, final power of review. The Court has explained that choice in

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197. See SA CONST. § 9(3).

198. *Du Plessis v. Road Accident Fund*, 2003 (11) BCLR 1220 (SCA), 2003 SACLX 42.

199. See *Ismail v. Ismail* 1983 (1) SA 1006 (A).

200. See *Amod v. Multilateral Motor Vehicle Accidents Fund*, 1998 (10) BCLR 1207 (CC) ¶30, 1998 SACLX 59. Contrast *Ryland v. Edros*, 1997 (1) BCLR 77 (1997) (C), where a High Court judge invoked Bill of Rights values and the command of SA CONST. § 39(2) as his warrant for reforming the prior application of the *boni mores* doctrine to this line of cases.

201. See note 164, *supra*, and text accompanying.

202. See SA CONST. § 167(3)(a) (“The Constitutional Court . . . is the highest court in all constitutional matters”); *id.* § 39(2) (“[W]hen developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”); *id.* § 173 (“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”)

terms of regard for the integrity of the common law and for the expertise of its ministry.<sup>203</sup>

Finally, let us not overlook the repeated occurrence in the judgments of the Constitutional Court, which I already have mentioned, of referrals to the common law as a source of standards against which to test statutes for alleged bill of rights/human-rights violations. This is *South Africa*, remember, where the general course of common-law adjudication during the half-century preceding the advent of the Bill of Rights is not especially admired.<sup>204</sup> And the judges of whom I speak are not a reactionary bunch — far, far from it! Nevertheless, consider what we find.

In an early case testing the boundaries of the right of privacy granted by section 13 of the Interim Constitution (invoked by a company officer resisting production of financial records), the CC looked to several sources for guidance, including the South African common law of privacy.<sup>205</sup> The Court warned that “[c]aution must be exercised when attempting to project common law principles onto the interpretation of fundamental [constitutional] rights,”<sup>206</sup> but the reason it gave for its warning suggested no general qualms about the common law’s normative reliability in the field of rights-definition.<sup>207</sup>

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203. See *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC) ¶¶ 50, 57-60, 1996 SACLR LEXIS 1; *Gardener v. Whitaker*, 1996 (6) BCLR 775 (CC) ¶ 16; *Amod*, 1998 (10) BCLR 1207, ¶¶ 30-33; *De Freitas v. Soc’y of Advocates of Natal*, 1998 (11) BCLR 1345 (CC) ¶¶ 19-21, 1998 SACLR LEXIS 52; *Carmichele v. Minister of Safety & Sec.*, 2001 (10) BCLR 995 (CC), 2001 SACLR LEXIS 64, ¶¶ 50-58; *Fourie v. Minister of Home Affairs*, 2003 (10) BCLR 1092 (CC), 2003 SACLR LEXIS 45, ¶¶ 12-13. The posture of referral to the SCA seems noticeably less pronounced in cases of constitutional challenge to common law doctrines imposing criminal responsibility or setting evidentiary and procedural rules for criminal prosecutions. See, e.g., *Thebus v. The State*, 2003 (10) BCLR 1100 (CC), 2003 SACLR LEXIS 46, where the CC gave what looks like a plenary review to an SCA ruling upholding an application of the common law doctrine of “common purpose” (compare “conspiracy”) to hold an accused responsible for a crime.

204. See, e.g., DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991) (also finding, however, that South African common law continued through the apartheid era to reflect natural-justice elements worth preserving).

205. See *Bernstein et al. v. Bester* NO, 1996 (4) BCLR 449 (CC) ¶¶ 68-71, 1996 SACLR LEXIS 3.

206. *Id.* ¶ 71.

207. The Court pointed to a significant difference in the respective orders of march in common law and constitutional litigation. In common law litigation, there is no separation between the question whether the plaintiff has suffered an infringement of his or legal right by reason of the defendant’s act and the question whether the defendant’s act was wrongful in a legal sense. The Constitution, by contrast, expressly permits the state to “limit” constitutionally enumerated rights when a proportionate justification for doing so can be shown. See SA CONST., 1993, § 33(1); *State v. Makwanyane*, 1995 (6) BCLR 645 (CC) ¶ 104, 1995 SACLR LEXIS 218 (introducing the proportionality test). Therefore, the Court implied, the constitutionally enumerated right of

In its very first announced decision, *State v. Zuma*,<sup>208</sup> the CC had to decide whether an apartheid era statute could survive the fair trial guarantee in section 25 of the new Bill of Rights.<sup>209</sup> The statute placed the burden on a criminal accused, in certain circumstances, to establish that a confession had *not* been coerced. The Court noted that a presumption of innocence and concomitant right of silence had been basic principles in South African common law for over 150 years, prior to undergoing "erosion" under the apartheid regime.<sup>210</sup> In the authentic, pre-corrupted South African common law tradition, a requirement that the prosecution prove a disputed confession's voluntariness had been considered a clear implication from an underlying principle (or "golden thread") to the effect that conviction of crime may come only upon the prosecution's proving guilt beyond a reasonable doubt. The CC accordingly considered the common law rule on burden of proof regarding the voluntariness of a confession not only to supply a part of the "background" to section 25 but itself to form a "part of the right to a fair trial" guaranteed by section 25.<sup>211</sup>

The Court's treatment of the common law in *Zuma* is matched by a reflection voiced not long thereafter by one of its members, Justice Albie Sachs. "[O]ur jurisprudence has many admirable features," Sachs wrote,

but has not always evolved in the direction of supporting openness and democracy, hence the need for selective utilization of decisions by our courts; the deference which courts normally give to "political acts" and to legislative outcomes of the democratic process, might be more tenuous in the case of decisions and legislation of the pre-democratic period; and we might be required to use a wider range of source material than traditionally has been the case.<sup>212</sup>

A like sentiment informed Sachs's response to a case<sup>213</sup> pitting the Interim Constitution's guarantees against compelled self-incrimination, in sections 25(2)(c) and 25(3)(d), against a statutory demand for testimony by a company officer before an insolvency master. A right against self-incrimination has ancient roots in English (and, by adoption, South African) common law, but Sachs noted that acceptance of legisla-

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privacy might warrant being given a more expansive *prima facie* range of application than its common law counterpart necessarily would suggest. See *id.*

208. 1995 (4) BCLR 401 (SA), 1995 SACLR LEXIS 219.

209. SA Const., 1993, § 25. Section 25(3)(c) specifically grants rights "to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial," but the text does not specifically address the "reverse onus" issue presented in *Zuma*.

210. *Id.* ¶ 12.

211. *Id.* ¶¶ 12, 33.

212. Coetzee v. Gov't of the Republic of South Africa, 1995 (10) BCLR 1382 (CC) ¶ 46 n.44, 1995 SACLR LEXIS 275 (Sachs, J.).

213. See Ferreira v. Levin NO, 1996 (1) BCLR 1 (CC), 1996 SACLR LEXIS 2.

tive interference with the right in the context of a company insolvency “is almost as old as the right itself.”<sup>214</sup> Of course, that fact of acceptance — which arose in a context of full parliamentary sovereignty — would not by itself settle whether such interference can be justified in the new constitutional order. “Nevertheless,” Sachs wrote,

the well-established nature of the legislative exception, both in our country and abroad, when measured against the relatively inchoate and adaptive nature of the common-law principle, indicates that it could well pass the test at least of reasonableness and justifiability. In *S v Zuma*, . . . Kentridge AJ asked “why it should be thought reasonable to undermine a long-established and now entrenched right.” In the present case, however, the limitation itself is almost as ancient as the right it impinges on . . . .<sup>215</sup>

### C. *The Views of Owen Fiss*

The “rosy” way of thinking about common law adjudication that I have ascribed to some South African jurists, some of the time, is one for which Owen Fiss has been an eloquent and influential advocate for going on the past quarter-century.<sup>216</sup> Professor Fiss’s vision of a judicial interpretive community, expertly working out applications of public values to social disputes, applies at least as strongly to common law as to constitutional adjudication, and quite plausibly more strongly. (Of course, it does not follow that Fiss is bound to argue — or in fact would argue — in defense of every piece of ancient or recent South African common law that has come or will come under constitutionally motivated reinspection.)

We can read the whole story condensed in a recent, ten-page essay by Fiss on the autonomy of law.<sup>217</sup> “Law,” Fiss writes, is “an autonomous sphere of human activity” serving a “panoply of values” that includes “political freedom, individual conscience, and substantive equality.”<sup>218</sup> Now, Fiss does not speak here only, or even primarily, of *constitutional* law. He cannot so be understood, because he speaks of an activity-sphere that is *autonomous*, meaning it serves no master but one alone (to which the panoply, it seems, is reducible), namely, the reasonable and rational cause of human dignity.<sup>219</sup> Among the masters explic-

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214. *Id.* ¶ 262.

215. *Id.* ¶ 263.

216. The writings I have in mind trace back at least to Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979). See also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986); Owen Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

217. Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517-26 (2001).

218. *Id.* at 517, 519.

219. Law serves no master, Fiss writes, save “justice,” *id.* at 517; “human rights” have justice

itly *not* served by law, in Fiss's view, is democratic politics.<sup>220</sup> But a product of politics — let us say, of politics at its best — is exactly what South Africans understand their Constitution and its Bill of Rights to be!

Why should they not? No one I know of has a theory of the normative claim of constitutional law (as such) to bind a country's population that makes no overt or covert reference to the constitution's political provenance.<sup>221</sup> And anyway, today's South Africans (here they differ from today's Americans whose demiurge Framers have receded into a deep and misty past) have eye-witnessed their Constitution being hammered out in the political foundry — a good deal nicer place, no doubt, than your average sausage factory,<sup>222</sup> a site, no doubt, of *constitutional* politics,<sup>223</sup> but still, unmistakably, a venue organized and driven by the force of human wills pursuing their several, sometimes clashing conceptions of political morality, national interest, and maybe some crumbs of self-interest, too. Call this view, if you will, constitutional-legal realism. A constitutional-legal realist consciousness repeatedly finds expression in the opinions of the South African Constitutional Court.<sup>224</sup>

Owen Fiss suggests no offset against such a consciousness, nor is

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as their "end," *id.*; and "the end of human rights" also is named "the protection of human dignity," *id.* at 523. See Strydom, *supra* note 181, at 62 (maintaining that principles of "human dignity, reasonableness, equity and good faith," along with those of equality and freedom, "embody the modern idea of the law. Even in the so-called private enclave or a-constitutional sphere, these principles [apply] . . . Besides, they are indispensable for the progressive development of a legal order on which the protection of human rights can fit comfortably.")

220. See *id.* at 517 (asserting that "the requirements of justice are not necessarily compatible with democracy").

221. See Frank I. Michelman, *Is the Constitution a Contract For Legitimacy?*, 8 REV. CONST. STUD. (forthcoming 2003).

222. I am thinking, of course, of the apparently undocumentable remark attributed to Bismarck: "The making of laws is like the making of sausages — the less you know about the process the more you respect the result." For a recent, online discussion of sources, see <http://lawlibrary.ucdavis.edu/LAWLIB/Dec02/0090.html> (last visited March 5, 2004).

223. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

224. For a couple of dramatic instances, see *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (7) BCLR 725 (CC) ¶¶ 70-76, 1999 SACLX LEXIS 18 (explaining why, in South African historical circumstances and with particular reference to the Constitutional Court, a "reasonable apprehension" of judicial bias requiring a judge's recusal from a case "cannot be based upon political associations or activities of judges prior to their appointment to the bench"); *Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa*, 1996 (8) BCLR 1015 (CC) ¶ 19, 1996 SACLX LEXIS 20 (construing the Truth and Reconciliation Act to authorize the granting of immunity against civil liability to persons confessing to certain apartheid-era crimes, upholding the Act as thus construed against Bill of Rights challenges by victims and their survivors, and explaining in part (but only in part) that "[f]or a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition . . . . If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming").

doing so really his concern. In Fiss's view, human rights ideals, composing the sole end and being the sole master of the activity-sphere we call law, happily may be "codified" in various positive-legal enactments.<sup>225</sup> Yet what finally credentializes those ideals as worthy and true is their recognition in a process of law that is not reducible to politics; and what can "law" possibly signify there but the activities of judges, of a kind we identify most closely with common law adjudication?

The judiciary at work stands apart from the rest of us, Fiss writes, because its members have no end but justice to pursue; because the judiciary is a collective body organized specially and aptly to serve that end; because "judges are impartial and hear grievances they might otherwise wish to ignore;" because judges "must justify their decisions in terms of shared principles."<sup>226</sup> For such reasons as those, adjudication, above and beyond all other social-official practices, may and should be regarded as a "structure of power devoted to making certain that justice is done."<sup>227</sup>

The point is: The encomium is to *adjudication*, not to any given, political constitution. The pure case, it would seem, of adjudication undiluted by politics is common law adjudication. Of course, we can — and it seems to me Fiss does — think sometimes in terms of a fusion between constitutional and common-law adjudication, one process taking inspiration from the other.<sup>228</sup> But when we do, or Fiss does, it is the adjudicatively "common" element as he conceives it, not the specifically "constitutional" one, that assumes normative priority and mastership — the moral-rational preceding the popular-political, the human-universal preceding the national-particular. Fiss would have no use, normatively, for any corpus of so-called constitution law that subordinated the pursuit of human dignity to any other goal, principle, or value.<sup>229</sup>

One might hesitate to read so much into a brief essay, were it not that the themes we identify there are continuous with those raised in older, more elaborate Fissean writings. In his 1986 Stevens Lecture, *The Death of the Law?*,<sup>230</sup> Fiss described adjudication (he did not specifi-

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225. *Id.* at 521.

226. *Id.* at 520.

227. *Id.*

228. See note 230, *infra* (Fiss); Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

229. That corpus wouldn't, by the way, be South Africa's. From the beginning of its work, the Constitutional Court has read the Bill of Rights as giving a normative centrality to the pursuit of human dignity — as a generally guiding "value" and not just as a specifically guaranteed entitlement or right. See, e.g., *Dawood v. Minister of Home Affairs*, 2000 (8) BCLR 837 (CC) ¶¶ 34-35, 2000 SACLR LEXIS 147; *State v. Makwanyane*, 1995 (6) BCLR 665 (CC) ¶ 144, 1995 SACLR LEXIS 218.

230. Fiss, *Death of the Law?*, *supra* note 216.

cally pick out *constitutional* adjudication) as “the” process for “interpreting and nurturing a public morality.”<sup>231</sup> He spoke of the law (not especially of *constitutional* law) as an embodiment of “shared understandings,” “our public values.”<sup>232</sup> He accorded to the judiciary (not specifying a *constitutional* judiciary) a special “right” to construe and declare our public values, not on the basis of any “moral expertise” attributed to judicial office holders but rather on the basis of the distinctive “processual norms that simultaneously constrain and liberate those who exercise judicial power.”<sup>233</sup> Fiss was referring to the insulation of courts from ordinary politics and their commitment to a special form of dialogue responsible to a set of disciplining rules that constitute a special interpretive community.

Fiss is explicit that it is not, finally, constitutional texts that drive adjudication. Rather the reverse is true. Adjudication is the container, constitutional law the contained. It is law, in the generic sense of a “distinctive . . . form of rationality,”<sup>234</sup> that drives and guides good constitutional interpretation. The standards for good constitutional interpretation consist of our public values and the disciplining rules of the legal profession, and those reside in a “legal system” and a “legal culture”

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231. *Id.* at 2.

232. *Id.* at 8. In *The Forms of Justice*, *supra* note 216, Fiss had written expressly of the judiciary’s special role in giving meaning to our “constitutional” values, *e.g.*, *id.* at 2, 11, but that essay as a whole conveys a usage of the term to mean a set of values equivalent to “public” values in a less positivistic, more immanent sense. First, Fiss frequently and obviously used the two terms interchangeably. *See, e.g., id.* at 14, where Fiss first wrote that “the task of a judge . . . should be seen as giving meaning to our public values” and then, one sentence later (with no intervening explanation), wrote that “the judiciary’s essential function is to give meaning to our constitutional values.” Second, Fiss denied that the content of constitutional values could be learned from the text of the Constitution. The values, he said, are “implicit in” the clauses. *Id.* at 10. The clauses “contain public values,” but what makes the contained values “public” isn’t their being contained in the clauses; rather, what makes them “constitutional” is their resonance with our society’s moral identity or “its distinctive public morality” as the judges construe it in the course of applying open-textured constitutional clauses. *Id.* at 11. (*See also* Fiss, *Objectivity*, *supra* note 216, at 751, 761-62, where Fiss wrote that the “ultimate authority” for a judicial order in the United States is the Constitution, but then gave as a reason for the Constitution’s primacy that it embodies our fundamental public values — or ought, at any rate, be assumed to do so.) Third, Fiss’s attribution of the public-value enunciating role to the judiciary at no point, in no way, rested on a value’s prior elevation — by some act of constitutional politics, let us say — to formally “constitutional” status. To the contrary, in Fiss’s view, it was the fact of a value’s having made it through the institutional screen of adjudication that “transformed” it into something deserving the accolade “constitutional.” *See* Fiss, *The Forms of Justice*, *supra* at 13. It could hardly, in his view, have been otherwise, because Fiss denied strenuously that constitutional values become such, or can be known as such, by any fact or event of designation or acceptance by the citizenry or the people. *See id.* at 12-13, 15. Finally, it was the institutions and processes by which judges act to which Fiss attributed the transformative power of their actions. *See id.* at 12 and text immediately following this note.

233. *Id.* at 8, 11.

234. *Id.* at 9.

that, competent constitutional interpreters will understand or assume, precede and inform the constitutional text.<sup>235</sup> You cannot tell from the words of the equal protection clause whether it is *Brown*<sup>236</sup> or *Plessy*<sup>237</sup> that gets matters right; but neither, on the other hand, is a true answer lacking to the question. Judges can get to the truth, but only because and insofar as they are constrained by norms that constitute the legal profession as such — the network of “disciplining rules that, like a grammar, define and constitute the practice of judging,” their authority drawn from the tacit knowledge of “the interpretive community of which the justices are a part.”<sup>238</sup>

We need not dwell at length on the probing essays on *Conventionism*<sup>239</sup> and *Objectivity and Interpretation*,<sup>240</sup> where Fiss provides some theoretical underpinnings for his conventionalist account of adjudication, as well as for the centrality he gives to that account in his presentation of law’s normatively dominant, indispensable place (or that of “the rule of law”<sup>241</sup>) in a morally well-ordered society’s affairs. The two later papers we have examined sufficiently disclose the payoff in terms of an attitude of presumptive respect for common law adjudication such as that coming through from many of the South African materials we have reviewed.

I do not imagine the South African judiciary, bar, or law professoriate simply signing on to Fissean juridical conventionalism or anything like it. I do not imagine them, individually or collectively, regarding Fiss’s claims with any lesser sense than their American cousins would have of tension with, or contradiction of, more starkly realist understandings. What does appear to be true is that the South Africans are no more prone and no more able than we are, individually and collectively, to escape entirely the pull of Owen Fiss’s encomium to the law — to the law unmodified, to the law as discipline — as an indispensable keeper of the flame of human rights and human decency.

It is not only among the attendees at the event recorded in this number of the *University of Miami Law Review* that everyone turns out to be a student of Owen Fiss, direct or (my case) indirect. Owen’s pupils abound, we may be sure, the world over.

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235. *Id.* at 11.

236. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

237. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

238. Fiss, *Death of the Law?*, *supra* note 216, at 11 (internal quotation marks omitted).

239. Fiss, *Conventionism*, *supra* note 216.

240. Fiss, *Objectivity and Interpretation*, *supra* note 216.

241. *See* Fiss, *Autonomy of Law*, *supra* note 217, at 517, 521.